CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 34

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

WILLIAM KUHN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

No. 35

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

WILLIAM KUHN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF PIKE COUNTY, STATE OF OHIO

PETITION FOR CERTIORARI FILED MARCH 14, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,719, 35,720)

( )

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IN COURT OF COMMON PLEAS OF PIKE COUNTY, OHIO

Case No. 7033

WILLIAM KUHN, Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant

PETITION—Filed Feb. 26, 1927

On the 8th day of February, 1926 plaintiff represents that he was employed by the defendant company on the extra force on defendant's railway right of way near Apex in Pike County, Ohio, and that he was so employed at all times hereinafter mentioned.

That on said day plaintiff with several other employees similarly employed were engaged in the cutting of a steel railroad rail with a chisel and sledge hammer, and that a sliver of the chisel or hammer was broken off and entered the left eye of plaintiff, thereby totally destroying the sight in said left eye and rendering it necessary for the removal of the same.

That on said day defendant company negligently, carelessly and unlawfully failed to provide goggles for the eyes for the use of the men engaged in cutting steel rails, as had been the custom in the past, and that said defendant company had carelessly, unlawfully and negligently furnished a sledge hammer and chisel which were defective, and from which said sliver came. That by reason of the facts [fol. 2] that the said defendant company carelessly, negligently and unlawfully failed to provide goggles as aforesaid and to provide proper tools as aforesaid, plaintiff's left eye was totally destroyed to plaintiff's damage in the sum of three thousand dollars ($3,000.00).

Wherefore, plaintiff prays judgment against the defendant company in the sum of three thousand dollars ($3,000.00).

George D. Nye, Attorney for Plaintiff.

Duly sworn to by William Kuhn. Jurat omitted in printing.

IN COURT OF COMMON PLEAS OF PIKE COUNTY

PRÆCIPE FOR SUMMONS

To the Clerk of Courts:

Issue summons to the Sheriff of Scioto County, Ohio for the defendant company upon Henry Bannon, attorney for said defendant, returnable according to law. Indorse thereon "Action for Money Only," Amount claimed three thousand ($3,000.00) dollars.

George D. Nye, Attorney for Plaintiff.

[fol. 3] IN COURT OF COMMON PLEAS OF PIKE COUNTY

SUMMONS AND SHERIFF'S RETURN—Filed Mar. 5, 1927

The State of Ohio, Pike County, to the Sheriff of Scioto County:

You are hereby commanded to notify The Chesapeake and Ohio Railway Company (get service on Henry T. Bannon, Division Counsel for said Co.), that it has been sued by William Kuhn in the Court of Common Pleas of said Pike County, and must answer by the 2nd day of April, A. D. 1927, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said sheriff will make due return of this summons on the 14th day of March, 1927.

Witness my hand and the seal of said Court, this 28th day of February, 1927.

Wm. Cline, Clerk, by C. A. Baylor, Deputy.

Sheriff's Return

THE STATE OF OHIO,
Scioto County:

Received this writ February 28th, 1927, at 10 o'clock A. M. And on 192-, I served the within named defendant, The Chesapeake and Ohio Railway Company, by delivering to Henry T. Bannon, Division Counsel for said Company, by personally handing to him a true and certified copy thereof with all the endorsements thereon.

E. J. Canter, Sheriff, by Harry Thornton, Deputy.

Sheriff Fees:

Service & Return, first name	$ .75
Additional names, at 25¢.	
Miles traveled at 8¢	.32
Docket	.10
Total	$1.17

The above summons the following endorsement: In action for "Money Only, Amount Claimed $3,000.00)

[fol. 4] In Court of Common Pleas of Pike County

Answer—Filed April 2, 1927

The defendant for its answer to the petition of the plaintiff says:

Defense Number 1

It admits that on February 8th, 1926 the plaintiff was employed by the defendant as one of an extra force working on its right of way near the place stated in the petition; it admits that while he was thus engaged some foreign substance entered the left eye of the plaintiff whereby the sight of his eye was destroyed and it was necessary to remove it.

The defendant denies each and every allegation stated in the petition except those hereinbefore specifically admitted to be true and especially denies that the plaintiff was engaged in the cutting of railroad rail with either chisel or hammer at the time of receiving the injury of which he complains.

Defense Number 2

For its second defense, the defendant says the plaintiff was, at the time of said injury, and long prior thereto, acquainted with all the circumstances and conditions under which the work on the right of way was being performed by the defendant and that he knew whether or not he was being provided with any goggles at the time he received the injury complained of and after acquiring such knowl-

edge, he continued to work upon the right of way and about where steel rails were being cut, voluntarily, and at his [fol. 5] own risk and without any compulsion by defendant.

Levi B. Moore, Henry Bannon, Attorneys for Defendant.

Duly sworn to by Henry Bannon. Jurat omitted in printing.

[fol. 6] In Court of Common Pleas of Pike County

Amendment to Answer—Filed May 27, 1927

The defendant, for an amendment to its answer heretofore filed, says:

At the time of the injury to the plaintiff mentioned, referred to and described in the petition, both the plaintiff and the defendant were engaged in interstate commerce in this, to-wit: They were repairing the railroad track of a railroad engaged exclusively in the transportation of commerce between the states of West Virginia, Kentucky and Ohio.

Levi B. Moore, Henry Bannon, Attorneys for Defendant.

Duly sworn to by Henry Bannon. Jurat omitted in printing.

[fol. 7] In Court of Common Pleas of Pike County

Reply—Filed April 15, 1927

Now comes the plaintiff and for his reply to the answer of the defendant, says: That he denies each and every allegation in said answer contained, and prays as in his petition.

George D. Nye, Attorney for Plaintiff.

Duly sworn to by William Kuhn. Jurat omitted in printing.

[fol. 8] IN COURT OF COMMON PLEAS OF PIKE COUNTY

VERDICT—Filed June 9, 1927

This day came the parties herein, by their attorneys; also came the following named persons as Jurors, to-wit:

1. J. W. Downing,
2. Dorothy Cameron,
3. Charles Shanks,
4. John Lochbaum,
5. Roy Pennisten,
6. Rose Baylor,
7. Louise M. Hoeckh,
8. J. M. Moore,
9. O. W. Parrill,
10. Charles Paige,
11. Joseph Dunham,
12. H. S. Caplinger,

who were duly impanelled and sworn according to law; and thereupon this case came on for hearing on the pleadings and evidence. And after hearing the evidence, argument and charge of the court, the jury retired to their room, in charge of the sheriff, for deliberation.

And now comes said jury into open court with their verdict in writing, signed by each concurring juror, and says:

"We, the jury, being duly impanelled and sworn, find the issues in this case in favor of the plaintiff, and assess the amount due to the plaintiff from the defendant, the said The Chesapeake and Ohio Railway Company, at the sum of Three Thousand Dollars.

And we do so render our verdict upon the concurrence of ten members of our said jury, that being three-fourths or more of our number.

Each of us said jurors concurring in said verdict signs his name hereto this 9th day of June, 1927.

J. W. Downing, Foreman; Dorothy Cameron, Charles C. Shanks, John Lochbaum, Rose Baylor, Roy Pennisten, Louise M. Hoeckh, J. M. Moore, O. W. Parrill, Charles Paige."

And the jury being inquired of by the court, if this was their verdict, each concurring juror answered in the affirmative.

And thereupon came the defendant in open court and gave notice of its intention to file a motion for a new trial herein.

S. D. McLaughlin, Judge.

[fol. 9] In Court of Common Pleas of Pike County

Motion For a New Trial—Filed June 10, 1927

The defendant moves to vacate the verdict heretofore returned in this cause and grant it a new trial for the following causes affecting materially its substantial rights.

1. The damages given by the jury are excessive, appearing to have been given under the influence of passion or prejudice and without a scintilla of evidence to support any damages whatsoever.

2. The verdict is not sustained by sufficient evidence.

3. The verdict is contrary to law.

4. Error of law occurring at the trial and excepted to by the defendant.

5. The court erred in overruling the defendant's motion to direct a verdict in its favor at the conclusion of all the evidence offered in the cause.

6. The court erred in its general charge to the jury.

7. Misconduct of the attorney for the plaintiff in his argument to the jury, to which misconduct an objection was interposed by the defendant and overruled by the court, and to which the defendant excepted.

8. The verdict of the jury is contrary to the manifest weight of the evidence.

Levi B. Moore, Henry Bannon, Attorneys for the Defendant.

[fol. 10] In Court of Common Pleas of Pike County

Judgment—Filed June 10, 1927

This cause being heard on the motion of the defendant to vacate the verdict and grant a new trial, the court, on consideration, overrules the same, to which ruling the defendant excepts and its exceptions are noted of record.

It is therefore considered by the court that the said plaintiff, William Kuhn, recover from the said defendant, The Chesapeake and Ohio Railway Company, the sum of Three Thousand Dollars, as heretofore found due him by the verdict of the jury, together with his costs herein expended,

to all of which the defendant excepted and its exceptions are noted of record.

[fol. 11] In Court of Appeals of Pike County

Petition in Error—Filed June 16, 1927

The plaintiff in error says that at the May term, 1927, of the Court of Common Pleas of Pike County, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in a case then pending therein, wherein defendant in error was plaintiff and plaintiff in error was defendant, a transcript of the docket and journal entries whereof is filed herewith.

There is error in the said record and proceedings in this, to-wit:

1. Said court erred in overruling the motion of plaintiff in error for a new trial.

2. Said court erred in its general charge to the jury.

3. Said court erred in refusing to give the charges asked for by plaintiff in error.

4. Said court erred in overruling the motion of plaintiff in error to direct the jury to return a verdict in its favor at the conclusion of all the evidence offered in the cause.

5. Said court erred in not directing the jury not to consider a certain statement made on behalf of defendant in error to the jury during the closing argument for the defendant in error.

6. Said judgment was given for said defendant in error when it ought to have been given for said plaintiff in error.

Plaintiff in error, therefore, prays that said judgment may be reversed and that it be restored to all things that it has lost by reason thereof.

Levi B. Moore, Henry Bannon, Attorneys for Plaintiff in Error.

[fol. 12] The issuance and service of summons in error is hereby waived and appearance of defendant in error is hereby entered.

George D. Nye, Earl D. Parker, Attorneys for Defendant in Error.

[fol. 13] In Court of Appeals of Pike County

No. 77

Judgment—Filed Dec. 21, 1928

This cause came on for hearing upon the Petition in error, the transcript and the original papers and pleadings from the Court of Common Pleas of Pike County and was argued by counsel; and on consideration thereof, the court finds that there is error apparent upon the record and proceeding of said court to the prejudice of the plaintiff in error in this, to-wit:

The Court erred in not sustaining the motion of the plaintiff in error for a directed verdict at the conclusion of all the evidence offered in the cause; in not sustaining the motion of the plaintiff in error for a new trial, and for errors in the charge of the court and in the failure of the court to charge as requested.

It is, therefore, considered by this court that the judgment rendered by said court be reversed and held for naught and that a new trial be granted to the plaintiff in error in said court, and that the plaintiff in error recover its costs herein expended from the defendant in error; and that a special mandate be sent to the Court of Common Pleas for the execution of this judgment.

[fol. 14] In Court of Common Pleas of Pike County

Amended and Supplemental Petition—Filed April 24, 1929

Now comes the plaintiff after leave of Court first had and obtained, and files this his amended and supplemental petition, and avers that at all times herein mentioned he was and still is a resident of Pike County, Ohio; that the defendant is a corporation duly organized and operating as such corporation under the laws of the State of Virginia.

Plaintiff says that on or about the 8th day of February, 1926, and for some time prior thereto, he was employed by the defendant in the capacity of section hand; that on or about said day, to-wit: the 8th day of February, 1926, pursuant to the order and direction of the defendant, the plain-

tiff was engaged, while in the course of his employment, in cutting steel rails; that it became necessary, in the course of plaintiff's work, to use a hammer and chisel in cutting said steel rails; that plaintiff was provided by the defendant with a hammer and chisel to use in cutting said steel rails and was ordered by the defendant to use said tools in doing said work; that plaintiff did use said tools in doing said work pursuant to the direction of the defendant; that said chisel and sledge hammer were defective and splintered and unsafe for use to the knowledge of the defendant; that it had been customary while engaged in cutting steel rails to provide the men with goggles to protect their eyes, there being guards or goggles for that purpose in the possession of and available to the defendant; that the foreman on duty on said day, to-wit: the 8th day of February, 1926, was a new man and unfamiliar with said work; that said foreman commanded and ordered the plaintiff to complete his work without the use of guards or goggles for [fol. 15] the plaintiff's eyes; that pursuant to the command and direction of the plaintiff's foreman and superior in charge of plaintiff and defendant's work, the plaintiff continued to work with the tools without the use of guards or goggles for his eyes; that while he was so engaged in his work, suddenly and without warning a piece or splinter of the chisel or sledge hammer, which he was using, flew off and from said chisel or sledge hammer, penetrating the left eye of plaintiff, injuring the plaintiff to the extent and manner, to-wit: completely destroying the sight in said eye so that it was necessary to remove the same; that plaintiff has become blind and has lost the use and sight of said left eye; that, with reasonable certainty, plaintiff is in danger of either losing or becoming impaired in the use and vision of his right eye; that he sustained a severe shock and injury to his entire nervous system, sustained excruciating pain, and will, with reasonable certainty, be caused to suffer pain from his aforesaid injuries in the future; that his injuries are permanent and progressive.

Plaintiff says that the direct and proximate cause of the injuries to his body and person was the negligence of the defendant, in the matters and things as follows, to-wit:

1. That the defendant negligently ordered the plaintiff to use said sledge hammer and chisel after the defendant

knew or ought to have known of the defective condition of the same.

2. In that the defendant negligently failed to promulgate, perform and carry out a rule or rules for the proper maintenance and upkeep in proper repair for use, the tools used in the ordinary mode by the plaintiff.

3. In that the plaintiff was provided with and knowingly ordered to use a sledge hammer, chisel, or similar tool, the cutting edge of which was out of repair and unfit for use in the ordinary mode.

[fol. 16] 4. In that the defendant negligently failed to provide the plaintiff with guards or goggles for his eyes when said guards or goggles were in the possession of or available to the defendant and when the defendant knew or by the exercise of ordinary care should have known that ordering the plaintiff to use said chisel and sledge hammer in the aforesaid condition, without said guards or goggles over the plaintiff's eyes, that plaintiff would be caused to be injured.

5. In that the defendant negligently failed to promulgate, carry out and execute a rule or rules requiring employes to adopt and use goggles or guards over their eyes while using a sledge hammer or chisel or similar tool when cutting steel rails.

6. In that the defendant negligently failed to promulgate, carry out or execute a rule requiring the foreman of the section gang to provide goggles or guards for the use of a section man for the protection of his eyes while using the tools in cutting steel rails.

7. In that the defendant negligently failed to exercise ordinary care to provide plaintiff with a reasonable safe place to do his work.

Plaintiff says that at the time of the matters complained of he was a strong, vigorous man in good health, working, able to work, earning and able to earn money at his trade as section hand; that since the matters complained of, he has been partially incapacitated in his ability to work and earn money, and that, with reasonable certainty, he will

be incapacitated in his ability to work and earn money in the future.

Wherefore, plaintiff, having been damaged in his body and person, prays judgment against this defendant in the sum of Thirty Thousand Dollars ($30,000.00) and costs.

Earl D. Parker, George D. Nye, Attorneys for Plaintiff.

[fol. 17] *Duly sworn to by William Kuhn. Jurat omitted in printing.*

[fol. 18] In Court of Common Pleas of Pike County

Answer to Amended and Supplemental Petition—Filed May 14, 1929

The defendant, for its answer to the petition of the plaintiff, says:

Defense No. 1

It admits that on February 8, 1926, the plaintiff was employed by the defendant as one of an extra force working on its right of way near the place stated in the petition; it admits that while he was thus engaged, some foreign substance entered the left eye of the plaintiff, whereby the sight of his eye was destroyed and it was necessary to remove it.

The defendant denies each and every allegation stated in the petition except those hereinbefore specifically admitted to be true, and especially denies that the plaintiff was engaged in the cutting of railroad rail with either chisel or hammer at the time of receiving the injury of which he complains.

Further answering, the defendant avers that at the time of the injury to the plaintiff mentioned, referred to and described in the petition, both the plaintiff and the defendant were engaged in interstate commerce, in this, to-wit: they were repairing the railroad track of a railroad engaged exclusively in the transportation of commerce between the states of West Virginia, Kentucky and Ohio.

Defense No. 2

For its second defense, the defendant says the plaintiff was, at the time of said injury, and long prior thereto, acquainted with all the circumstances and conditions under which the work on the right of way was being performed by the plaintiff and the defendant, and that he knew whether or not he was being provided with any goggles at the time [fol. 19] he received the injury complained of; knew of the condition of both hammer and chisel; knew the defendant's rules; and knew of all the things complained of by him, and after acquiring such knowledge, he continued to work upon the right of way and about where steel rails were being cut voluntarily, and at his own risk, and without any compulsion by the defendant.

Defense No. 3

For its third defense to said petition, defendant says that should it appear upon the trial of this cause that it was guilty of any negligent act, as stated in the petition, the plaintiff at the time he received the injuries of which he complains was guilty of negligence concurring with such negligence of the defendant and contributing to the injuries of the plaintiff as a proximate cause, in this, to-wit: at the time of the accident complained of the plaintiff was a mere by-stander, not engaged in the cutting of the rail, and he negligently, voluntarily and unnecessarily took a position where his eye might be struck by any chip which might fly either from rail, hammer or chisel.

Levi B. Moore, Henry Bannon, Attorneys for Defendant.

Duly sworn to by Henry Bannon. Jurat omitted in printing.

[fol. 20] In Court of Common Pleas of Pike County

Reply to the Answer to Amended and Supplemental Petition—Filed Nov. 27, 1929

The plaintiff for his reply to the answer to the amended and supplemental petition, denies "that at the time of

the injury to the plaintiff mentioned, referred to and described in the petition, both the plaintiff and the defendant were engaged in Inter-state commerce, in this, to wit: they were repairing the railroad track of a railroad engaged exclusively in the transportation of commerce between the States of West Virginia, Kentucky and Ohio."

Plaintiff further states that neither plaintiff nor defendant were engaged in Inter-state commerce between the States above mentioned or between any other states and those mentioned.

Plaintiff further replying, denies each and every allegation contained in Defense No. 2 and Defense No. 3 and prays as in the Amended and Supplemental Petition.

Wm. Kuhn.

Sworn to before me and submitted in my presence this 26th day of November, 1929. George D. Nye, Notary Public, Pike County, Ohio. (Seal.)

[fol. 21] In Court of Common Pleas of Pike County

Verdict—Filed Nov. 29, 1929

This day came the parties herein, by their attorneys; also came the following named persons as jurors, towit: Roy Patterson, Newton Christman, William Wisemen, Andrew Brigner, Samuel Lightle, Homer McDowell, Adam Ginther, W. E. Farmer, Carl Osborne, Rosa Lightle, Roy McKenney, J. T. McLean, who were duly impaneled and sworn according to law; and thereupon the case came on for hearing on the pleadings and evidence; and the jury having heard the testimony adduced in part, said cause was continued until tomorrow morning at 9 o'clock.

Russell K. McCurdy, Judge.

This day again came the parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded. And the said jury, having heard the remaining testimony, the argument and charge of the court, retired to their room, in the charge of the sheriff, for deliberation. And now comes the said jury into open court,

with their verdict in writing, signed by each concurring juror, and say:

"We the jury, being impaneled and sworn and affirmed, find the issues in this case in favor of the Plaintiff and assess the amount due to the Plaintiff from the Defendant the said The Chesapeake and Ohio Railway Company at the sum of $6,000.00—Six Thousand Dollars.

And we do so render our verdict upon the concurrence of Twelve members of our said Jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 27th day of November, 1929.

Roy McKenney, Rosa Lightle, A. Brirner, Samuel Lightle, Homer McDowell, J. T. McLean, W. E. Farmer, Andrew Ginther, Wm. Wiseman, Carl Osborne, Newt Christman, R. E. Patterson.

And the jury being inquired of by the court if this was their verdict each for himself replied that it was.

Thereupon came the defendant and gave notice of his intention to file a motion for new trial herein.

[fol. 22] In Court of Common Pleas of Pike County

Motion for New Trial—Filed Nov. 29, 1929

Defendant moves the court to vacate and set aside the verdict of the jury and grant it a new trial for the following reasons, to-wit:

1. The damages given by the jury are excessive, appearing to have been given under the influence of passion and prejudice.

2. The verdict is not sustained by the weight of the evidence.

3. The verdict is contrary to law.

4. Errors of law occurring at the trial and excepted to by the defendant.

5. The court erred in rejecting evidence offered by the defendant.

6. The court erred in admitting evidence offered by the plaintiff.

7. The court erred in charging the jury.

8. The court erred in refusing to charge the jury in the general charge, as requested by the defendant.

9. The court erred in overruling defendant's motion to direct a verdict in its favor at the conclusion of all the evidence offered in the cause.

Levi B. Moore, Henry Bannon, Attorneys for Defendant.

[fol. 23] In Court of Common Pleas of Pike County

Judgment—Filed March 20, 1930

This cause coming on for hearing, on the motion of the defendant to set aside the verdict, and for a new trial herein, the court, on consideration thereof, overrule the same, to which ruling the defendant excepts and its exception is noted of record.

It is therefore considered by the court that the said William Kuhn, plaintiff, recover from the said The Chesapeake and Ohio Railway Company, defendant, the said sum of Six Thousand Dollars ($6,000.00), as heretofore, by the verdict of the jury, found due him, together with his costs herein expended, to which judgment defendant excepts and its exception is noted of record.

Russell K. McCurdy, Judge of the Court of Common Pleas.

[fol. 24] In Court of Appeals of Pike County

Petition in Error—Filed March 29, 1930

The plaintiff in error says that at the January term, 1930, of the Court of Common Pleas of Pike County, Ohio, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in a case then pending therein, wherein defendant in error was plaintiff and plaintiff in error was defendant, a transcript

of the docket and journal entries whereof is filed herewith.

There is error in the said record and proceedings in this, to-wit:

1. Said court erred in overruling the motion of plaintiff in error for a new trial.

2. Said court erred in its general charge to the jury.

3. Said court erred in refusing to give the charges asked for by plaintiff in error.

4. Said court erred in overruling the motion of plaintiff in error to direct the jury to return a verdict in its favor at the conclusion of all the evidence offered in the case.

5. Said judgment was given for said defendant in error when it ought to have been given for said plaintiff in error.

Plaintiff in error, therefore, prays that said judgment may be reversed and that it be restored to all things that is has lost by reason thereof.

Levi B. Moore, Henry Bannon, Attorneys for Plaintiff in Error.

The issuance and service of summons in error are hereby waived and appearance of defendant in error is hereby entered.

Nye and Parker, Attorneys for Defendant in Error.

[fol. 25] In Court of Appeals of Pike County

No. 97

Judgment—Filed Dec. 18, 1930

This cause came on for hearing upon the Petition in Error, the transcript and original papers and pleadings from the Court of Common Pleas, Pike County, and was argued by Counsel; on consideration whereof, the court find there is no error apparent on the record in said proceedings and judgment prejudicial to and affecting the substantial rights of the plaintiff in error, and that in the opinion of the court, substantial justice has been done the plaintiff

in error as shown by the record of the proceedings and judgment under review, to which finding of the court the plaintiff in error excepts, and its exceptions are noted of record.

It is therefore considered by the court that the judgment aforesaid be, and the same hereby is, affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended taxed at $—, to which judgment of affirmance the plaintiff in error duly excepted and its exception is noted of record.

And the court being of opinion that there was reasonable ground for proceedings in error, allow no penalty.

It is further ordered that a special Mandate be sent to the Common Pleas Court of Pike County for execution upon this judgment.

[fol. 26] In Court of Appeals of Pike County

Opinion—Filed December 15, 1930

Blosser, J.:

We shall refer to the parties as they were styled in the court below. The plaintiff brought an action to recover damages for the loss of an eye, alleged to have been sustained by him in the course of his employment as a member of a section gang working on defendant's railway and thru the negligence of the defendant, while engaged in cutting a steel rail by means of a chisel and hammer or sledge. It is alleged by the plaintiff that a small piece of steel from the chisel or hammer struck his eye and resulted in its loss. One of the acts of negligence charged is that the defendant furnished him with a defective chisel and hammer, that they were worn and burred, and that he was peremptorily ordered to use these tools without furnishing him with goggles for the protection of his eyes. The defendant alleged that the plaintiff at the time of his injury was well acquainted with all the conditions and circumstances under which this work was being performed, was well acquainted with the condition of the chisel and hammer and knew all the things complained of by him, and after acquiring all

such knowledge continued in such work at his own risk without compulsion by the defendant. In other words, the defendant pleaded the assumption of risk by the plaintiff.

The evidence discloses that several men were working in the section gang; that while one man held the chisel each of the other men took his turn at striking it with the hammer, and that while plaintiff was waiting his turn to use the hammer he received the injury complained of. The men were in charge of a foreman, and there is some evidence tending to show that the foreman in charge was positive and dictatorial in his manner and, as one witness said, "The men were kind of raw hided there that morning." [fol. 27] The track was out of repair and the cars had been jumping the track, and the foreman was in a great hurry to repair the same. It was necessary to cut two steel rails and place them in the track. There is some evidence that the foreman commanded the men "To gang up around here and don't be afraid," and also that he commanded them to "Gang up and go in a hurry, that he wanted to get thru here." The plaintiff testified that he was the next man in line to use the hammer and that the foreman said "Step up close. Be ready to relieve the man that is hammering." It was while waiting his turn to use the hammer that the plaintiff was struck in the eye by a splinter of steel.

This is the second time this case has been in this court for review. In the first proceeding in error this court reversed the judgment of the Court of Common Pleas on the ground that the verdict of the jury in favor of the plaintiff was against the manifest weight of the evidence. This court can not reverse the judgment of the Court of Common Pleas a second time on that ground.

It is urged by the railway company in this proceeding that the plaintiff was not acting under a peremptory order at the time of his injury. A peremptory order is difficult to define. Words and conduct that might be considered a peremptory order under one set of circumstances might not be considered such under different conditions and circumstances. The evidence in the record above referred to discloses such facts and circumstances and conditions that it would constitute some evidence tending to prove that the plaintiff might have yielded his own judgment to that of the foreman, and the words and conduct of the foreman might have constituted a peremptory order.

[fol. 28] The defendant company complains that the trial court did not charge the jury that no peremptory order was given. This was properly refused and the trial court properly submitted the question to the jury. This is the rule laid down in the case of Malsek v. Penn. R. R. Co., 26 O. A. 520, affirmed by the Supreme Court in 118 O. S. 644.

It has been suggested that we should look to the Federal Courts for interpretation of questions arising under the Federal Employers' Liability Act. This is the general rule but where our Supreme Court has passed upon a question, as it has this one, it is our duty to follow the decision of our Supreme Court rather than the decision of a court of some other jurisdiction.

The defendant in a second defense of its answer to the petition alleged that at the time of the plaintiff's injury he was well acquainted with the conditions and circumstances of his employment and, in substance, assumed the risk of the dangers and hazards thereof, and that he continued in said work at his own risk. This defense of assumption of risk is denied by the plaintiff in his reply. Under this state of the pleadings it was incumbent on the defendant to provide this defense by a preponderance of the evidence. The question of the plaintiff's assumption of the risk is one for the jury and the burden of proof of assumption of risk is on the employer, that is, the defendant in this case. New York, etc., v. Pugh, 11 O. A. 17.

The jury may have found under the evidence that the plaintiff did not assume the risk as a matter of fact. Under such circumstances it was not necessary to avoid the assumption of risk by proving that the plaintiff at the time of his injury was acting under a peremptory order. It is only necessary to find there was a peremptory order after the jury had found that the risk was assumed. As to [fol. 29] whether the risk was assumed in this case was a question of fact for the jury to determine. Malsek v. Railroad Co., supra.

From the foregoing we are of the opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

Middleton, P. J., and Mauck, J., concur.

[fol. 30] In Court of Common Pleas of Pike County

Bill of Exceptions—Filed in Common Pleas April 3, 1930. Filed in Court of Appeals, April 4, 1930

Be it remembered that on Tuesday, November 26th, 1929, at the trial of said cause, before Honorable Russell K. McCurdy, Judge of the Court of Common Pleas, Scioto County, Ohio, Trial Judge, and a Jury, the following proceedings were had:

[fol. 31] Thereupon William Kuhn, being called to the stand, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name is William Kuhn?
A. Yes, sir.
Q. And you are the plaintiff in this case?
A. Yes, sir.
Q. Where do you live, Mr. Kuhn?
A. Out in what's known as Germany.
Q. How long have you lived there?
A. All my life.
Q. How long is that?
A. 54 years.
Q. Were you employed on the 9th of February, 1926——
A. Yes, sir.
Q. And if so, where?
A. On the C. and O.
Q. In what capacity?
A. As laborer.
Q. In what department of the railroad?
A. Engaged in what is known as the extra force at that time.
Q. Section gang?
A. Well, on what you call the extra force under Mr. James Galford.
Q. On this particular morning or day were you working under Mr. Galford?
[fol. 32] A. Well, we had a new foreman on the job, had

been about a week. He was the assistant and I was working under him at this particular time.

Q. What was his name?

A. Otis Balsworth.

Q. And was there any other assistant foreman?

A. Joseph Sturgil.

Q. What work were you engaged in when you started work that morning?

A. The first part of the morning?

Q. Yes.

A. The first thing we done was to carry a bale of straw from the pike to the railroad where they were hauling out dirt and they were putting this straw to keep it from freezing so bad.

Q. What time did you go to work that morning?

A. The usual time—7:00 o'clock.

Q. What did you next do?

A. We were repairing the side track.

Q. Explain where that was.

A. I imagine about 75 or 100 yards from the place known as the Apex tool house.

Q. What particular kind of work were you doing?

A. Cutting rail- at the present time.

Q. Where did you get these rails?

A. They were on the loading -rack where they used to haul out dirt. They were widening the roadbed in order to put in the second track, and this was absolutely a dirt track. The loading track came out on the other end at [fol. 33] the present time.

Q. Had any trains ever run over that track?

A. No, sir; only dirty trains.

Q. What were you doing? What were your duties at that time?

A. Using a hammer striking, and I had——

Q. Describe to the jury about these rails in your own language.

A. It seems as tho they were having trouble. There was a little gravel there just off the switch from the main line, and they had been having trouble with cars running off this particular curve, and they thought by cutting a couple of rails, which they done, on back 6 or 8 inches, would remedy the cause, and we had one of them cut off, and we were

working on the second rail when this accident happened to me.

Q. Well, now, who told you to cut steel rails, if anybody did?

A. The foreman, Balsworth, and also Sturgil.

Q. What was said in connection with that, if you recall?

A. I couldn't just recall any special words, but we were called up there to do this work.

Q. How many men were used in cutting these rails?

A. Well, there had been 3 of us engaged at the present time using the sledge hammer.

Q. Who were they?

A. John Smith, myself and Ben DeLay.

[fol. 34] Q. To refresh your recollection, did Mr. Sturgil say——

Objection.

Sustained, as to the form of the question.

Q. Do you recall anything said by Mr. Sturgil, to refresh your recollection?

A. No, I don't know as I do.

By Mr. Nye: If the Court please, I believe I have a right to refresh his recollection and ask him if a certain thing wasn't said?

By Mr. Bannon: He can't tell him what to say. I object.

By the Court: Yes, if the witness fails to remember, you may refresh his recollection by asking a proper question.

Q. To refresh your recollection, did Mr. Sturgil, the foreman there, tell you to gang up and go in a hurry that he wanted to get thru there?

Objection.

Overruled.

Exceptions.

A. Yes, he done that. It seemed to be a hurry up job.

Q. Now, Mr. Kuhn, were there any goggles there for the protection of the eyes?

[fol. 35] A. No, sir, not on the job.

Q. How long had you been on this section job or working for the railroad?

A. Well, I had worked there quite a good deal before, but there was a time or two that I didn't work, but at this particular time I had been working for several months. I couldn't just remember.

Q. Did you ever cut any steel rails before?

A. Yes, sir.

Q. I will ask you if at the time when you cut steel rails prior to 1926 it wasn't customary to have goggles?

A. Always, at any time I was present in Mr. Galford's time.

Q. Now, Mr. Kuhn, what happened while you were cutting steel rails?

A. Well, there was a piece of steel flew and hit me in the eye and destroyed my eye. Of course, that's what you all can see. I was taken to Huntington, Virginia and the eye was removed.

Q. Who was striking when this occurred?

A. Ben DeLay was using the hammer at the time.

Q. Who had just struck prior to that?

A. John Smith had used and I had used it.

Q. Whose turn was next?

A. I was going to take the next turn.

Q. Were any instructions issued or orders given to keep in line?

A. Yes, sir.

Q. By whom?

[fol. 36] A. By Mr. Sturgil and also Mr. Balesworth.

Q. How were you standing at this particular time?

A. How's that?

Q. How were you standing at this particular time?

A. I was standing kind of side angle, if I may show you. (Demonstrates to jury.) Suppose you men were putting the rail there. When this happened to hit me. I was standing in this sort of position. It seemed to come in this position and hit me in the left eye, and that's about as much as I can give you on that.

Q. Is the sight of your left eye totally destroyed?

A. No, sir, nowheres near.

Q. I say have you any sight in your left eye?

A. No, sir.

Q. Have you an artificial eye?

A. Yes, sir.

Q. What effect does this have on you?

A. Well, in quite a few different ways. It causes me pain in different ways in my head and eyes and I can't see anyways near as good out of my right eye as I could at the time. It interferes with all kind of work that I do to quite an extent.

Q. I will ask if it interferes in any way with reading?

A. Yes, absolutely.

Q. To what extent?

A. Quite a great deal.

Q. In what way does your right eye trouble you?

[fol. 37] A. Seems as tho I have pains up there leading from this side leading over my eye at all times. Sometimes greater than others.

Q. It's the left eye with the glass, artificial eye? Does it cause you any trouble?

A. Very uncomfortable.

Q. Is it necessary to remove that eye at any time?

A. Every night I take it out and clean it. I was notified to that effect where I got it.

Q. Are you a married man, Mr. Kuhn?

A. No, sir.

Q. Now, as to the chisel with which these rails were being cut, describe to the jury the condition of that chisel.

A. Well, I didn't count it in very good condition when we started to use it. It seemed to be battered.

Q. How many chisels were there, if you know?

A. Several. 2 or 3. There may have been more.

Q. Do you know if any attempt was made to choose a chisel of the best that could be obtained?

A. Yes, they always aim to pick out the best.

[fol. 38] Cross-examination.

By Mr. Bannon:

Q. How many are there on that extra force?

A. At the present time? You mean at this particular place I was working?

Q. Yes.

A. I suppose, to the best of my knowledge, 14 or 15 there that morning.

Q. How many were engaged in that work of cutting the steel rails?

A. Well, I suppose there were 8 or 10 sitting around there at that time. There may have been 12.

Q. And who was holding the chisel against the rail?

A. A man by the name of Woodruff.

Q. And who was doing the striking?

A. Ben De Lay at the present time when this happened to me.

Q. Who else was using the maul in striking the rails?

A. John Smith and myself.

Q. Any others?

A. No, sir.

Q. Herschel Hartley using the maul?

A. Not to my recollection.

Q. James Davis?

A. Not to my recollection.

Q. Were they standing right in the immediate vicinity of where this work was being done?

[fol. 39] A. Right in the crowd. I couldn't *sub*scribe the position they were standing there or anything like that.

Q. What were they doing?

A. Helping on this same job.

Q. Yes. They were helping—James Woodruff, Herschel Hartley, Jams Davis, John Smith and yourself?

A. Yes, they were all in that immediate gang.

Q. As I understand it, one would wield the maul for a while and step aside and another one step up and take his place to relieve him?

A. Yes, sir.

Q. And that was done successively by yourself and the different persons I have named?

A. Not to my recollection.

Q. You won't say those men did not take part in that work of wielding the maul, will you?

A. To my best recollection and knowledge they did not at that particular time.

Q. Not at that particular time. I am not talking about that, but during the work of cutting that steel rail, those men whom I have mentioned, had at different times taken the maul there and used it, had they not?

A. I think they had, but not on this particular case unless they did after I was taken away. They may have after that. I wouldn't say.

Q. How long had you been engaged in cutting this rail when the accident happened?

[fol. 40] A. Just as I said. Sometimes it takes longer to cut a rail than it does others. Probably been there half an hour, 45 minutes. Something similar to that.

Q. Did it take that long for this one?

A. We had already cut one. No.

Q. How long on this particular rail?

A. Probably 10 minutes. Maybe 15. I wouldn't just say the exact time.

Q. And at the actual time the work was being done you didn't have the maul in your hands?

A. No. sir.

Q. And you were not holding a chisel?

A. No, sir.

Q. You were standing to one side?

A. Standing to the side ready to take my next turn.

Q. If you were standing in the position that you say you were standing when you illustrated that to the jury, wouldn't the sliver have gone in your right eye instead of your left?

A. It could, but it didn't happen to do that. It missed my right eye and got my left one.

Q. Wouldn't it have struck your nose?

A. It could have hit my nose and it could have hit my right eye.

Q. How could it get past your nose and into your left eye?

A. That's the mystery.

Q. That's the mystery. Does it really look reasonable? [fol. 41] A. No. It could hit me in the left as well as the right.

Q. It did hit you in the left eye, not in the right?

A. Absolutely in my left eye.

Q. It couldn't have hit you in the left eye as well as in the right if you were standing in the position you just illustrated to the jury, if those men were doing the striking. A splinter coming from that point would strike your nose before it struck your left eye?

A. I may have turned around when I was hit at that particular time.

Q. You may not have been in the position you showed to the jury?

A. I was standing in the position I showed. I may not have done it exactly the way I showed.

Q. Immediately before the accident happened you had been using the hammer yourself, hadn't you?

A. How was that?

Q. Immediately before the accident happened you had been using the hammer yourself, hadn't you?

A. Yes, sir.

Q. And you stepped aside and out of the way to let someone else use the hammer?

A. Yes, sir.

Q. Turned it over to another?

A. Yes, sir.

[fol. 42] Q. To whom did you turn the hammer over?

A. Ben De Lay, as I have mentioned here.

Q. You were not going to strike? Who would be the next one to strike after Ben De Lay?

A. I was going to use the maul next. I was going to relieve him when he was thru. That's what I stepped up for for that purpose.

Q. You didn't step up? You stepped back?

A. Out of his way.

Q. It wouldn't have been your next turn, would it?

A. It wouldn't just have had to have been. We quite often would do that.

Q. There was Herschel Hartley? He was there to help with the maul, wasn't he?

A. I couldn't say whether he was going to use the next one. I couldn't say whether he wanted to or not.

Q. He had been using the maul?

A. Not to my recollection.

Q. What about James Davis?

A. Not that day at that particular time to my knowledge.

Q. Who was using the maul besides you?

A. John Smith and Ben De Lay.

Q. Anybody else you can think of?

A. No, sir.

Q. John Smith would have been the next man to get it?

A. He may possibly have been.

Q. In other words, you don't know whether you were to have been the next man to cut the rail or not?

[fol. 43] A. That was my business to be there.

Q. I didn't ask you that.

A. I may not have used it next. Don't understand me to say I would have. I may have used it next.

Q. You may have and you may not?

A. I may have and I may not.

Q. You may have and you may not? Let's get the record pe-fectly clear. You don't want to be understood that you were to be the next one to use the maul?

A. No, sir.

Q. You say there were no goggles on this job?

A. No, sir.

Q. And, of course, tha' you knew at the time, didn't you?

A. How was that?

Q. That you knew at ne time?

A. Well, no, I didn't k ow it, but I didn't know there was or didn't know there w n't.

Q. You knew you didn't have on a pair of goggles?

A. Yes, absolutely.

Q. You had used the n aul striking the rail, hadn't you?

A. Certainly.

Q. And you knew befo e the accident you didn't have on a pair of goggles?

A. Yes, but I didn't now whether they were on the job.

Q. Well, now, if goggles were being used, had been used [fol. 44] upon this occas.on, you standing to one side and not having the maul, wo ldn't use goggles, would you?

A. Well, the men wer supposed——

Q. I didn't ask you t.at. Please answer the question. You heard it.

A. It's plain if there were only 2 pair of goggles at this time the chances are I w uld not have had goggles on.

Q. In cutting steel rails, the man who holds the chisel and the man who wields the maul are the men who wear the goggles?

A. I have seen as high as 3 or 4 using goggles.

Q. That would be with one man holding the chisel and 2 mauls—one strike and then the other?

A. No, not absolutely. I have seen 3 or 4 goggles. Men use them when they use the one hammer.

Q. You still have not answered my question.

A. How's that?

Q. If there had been goggles there you wouldn't have been wearing them standing to one side, would you?

A. If there had been more than 2 pair I would.

Q. If there had been 3 pair you would have been wearing a pair?

A. Absolutely.

Q. What about others standing in that crowd to take their turns? There were more than 3 people to do that work?

[fol. 45] A. I suppose if there had been more they would have had them on too.

Q. But they wouldn't be wearing them on their eyes after they quit cutting?

A. Yes, sir.

Q. Do they leave them on over their head?

A. Some do. Some don't.

Q. You have worked how long on the section or extra force there?

A. I can't recall the amount of months but I have been on quite a good bit.

Q. Give some idea about it.

A. They have the time, I imagine. I don't know about it. Right around about 5 months at that particular time. Somewheres near it.

Q. Had you worked at other times?

A. I had before.

Q. On the section?

A. Yes, sir.

Q. But——

A. Not as a section hand. Don't understand that.

Q. Doing section work, wasn't it?

A. Yes, sir.

Q. That's what I want. Not caring about ties. All in all how much time have you put in doing section work?

A. I couldn't just recall, but altogether it would amount to a year and a half, maybe. Yes, more than 2 years.

[fol. 46] Q. Did you ever cut steel rails before?

A. Yes, sir.

Q. You know chips are apt to fly from them, don't you?

A. Yes, sir.

Q. That's a matter of common knowledge among men working about these steel rails?

A. That's understood I suppose. That was the value of goggles.

Q. That's a matter of common knowledge that chips will be apt to fly?

A. Especially if you use hand tools.

Q. Even if you didn't, chips of steel will fly from the rail?

A. Could be.

Q. When you cut it, you chip it, don't you?

A. At times I suppose it does.

Q. When you hit the chisel with the maul, it frequently chips out a small bit of steel which flies to one side?

A. That can be.

Q. And even if the maul and chisel are in perfect condition that can be?

A. That can be, absolutely.

[fol. 47] Redirect examination.

By Mr. Nye:

Q. Why were you standing where you were at the time this chip entered your eye?

A. Why was I standing there?

Q. Yes.

A. To be up handy in time whenever they might call us to it.

Q. Had anyone told you to be there?

A. Yes, sir.

Q. Who was that?

A. Mr. Balsworth had and Sturgil told us to gang around there and do this work. It was a hurry up job.

[fol. 48] Thereupon one Owen Ramsey was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name?

A. Owen Ramsey.

Q. Where do you live, Mr. Ramsey?

A. Piketon, Route 1. Close to Wakefield.

Q. Were you in the employ of the C. and O. as section man on February 8, 1926?

A. I think it was Grayley, the contractor.

Q. You were working for the Grayley Contracting Company?

A. Yes.

Q. And what were you doing on that particular day?

A. I don't remember just everything I would be doing. Of course, worked part of the time on the dump track, and part of the time they worked on the loading track.

Q. On the loading track where Mr. Kuhn's eye was put out, were you there at that time?

A. Yes, sir.

Q. What were you doing at that particular time?

A. Holding a bar across the end of the rail I was cutting.

Q. Why were you doing that particular job?

A. If you don't hold the bar the rail slips off of the angle bar you are cutting on.

[fol. 49] Q. What was Mr. Kuhn doing?

A. Taking turns at the hammer cold cut.

Q. Do you know whether he received any order to do that?

A. Yes. A good part of the fellows there was to gang close to the end of the rail and take turns striking. That included everybody that didn't have a job, striking.

Q. Who said that?

A. Sturgill.

Q. Do you know what his position was?

A. He was foreman and seemed to be the head foreman that was there at the time.

Q. Now, what number of men were there who had just swung the maul, if you know?

A. I wouldn't know as to that.

Q. Were there any goggles used there on the job?

A. No, sir, not until after his accident.

By Mr. Bannon: Motion to strike out the words "After his accident".

Sustained.

Q. Had you heard previously to that Mr. Sturgill get his orders at any time from any superior?

A. Yes, sir.

Q. From whom?

A. The roadmaster.

Q. Now, as to the chisel on this particular job, could you tell us what the condition of that chisel was?

A. Only my opinion. There were, I judge there would be about 8 chisels on the job. They sorted those chisels to get one to use.

[fol. 50] By Mr. Bannon: Motion to strike out the answer.

By the Court: Motion sustained, and the jury is instructed not to consider the answer.

Q. Do you know of the condition of this particular chisel?

A. It was bad, because they hesitated on striking a few times, they said, using the chisel. It was the only one available to use.

Q. In what way was it bad, Mr. Ramsey?

A. I think our first trouble came up——

By Mr. Bannon: We move to strike out this man's answer that they hesitated. It wasn't responsive. He can't give his opinion. It is for him to tell the facts concerning that opinion.

By the Court: That's all very true. We don't know from that answer on what he is basing his statement. We will overrule your motion at this time. Not what you think. Confine your answers to what you know.

Q. What you saw and heard.

A. From the condition at the very end of the rail, the top of the chisel. It was burred down over the top of the chisel.

[fol. 51] Cross-examination.

By Mr. Bannon:

Q. How long was the rail?

A. I couldn't tell how long that rail would be. The full rail is 33 feet.

Q. How far away were you standing from where they were working?

A. Well, as I remember, they'd be ganged back about something like 8 inches off of that rail. That would make it something like 32 to 33 feet.

Q. You were 32 to 33 feet away?

A. Yes, sir.

Q. And engaged in holding a bar against a rail?

A. Yes, sir.

Q. Now, this track was a switch track of some kind that was in there, wasn't it?

A. Yes, a switch track, loading track.

Q. And connected at one end with the main line?

A. Yes, sir.

Q. Had there been a slip in the hill in the immediate vicinity of this place?

A. There was a slip I suppose. They were taking the dirt out of the fill above that a good piece.

Q. That dirt was being taken out from the right of way of the main line?

A. Well, the dirt had been taken out that would interfere with the main line. Part of it had been taken out and part had not.

[fol. 52] Q. Had the railroad company been engaged in removing earth from the right of way adjacent to the main track?

A. No; I think the contractor was removing that dirt.

Q. For whom?

A. The C. and O.

Q. That's the railroad?

A. Yes, but the railroad wouldn't be moving the dirt.

Q. They were paying for it? Everything they did they were paying for it? Let's not quibble about that. Why were they taking out that dirt?

A. To keep a slide that was squeezing from interfering.

Q. Was it necessary that they have this switch track in there where they were cutting the rail in order to remove that dirt?

A. Sure.

Q. So this switch track upon which these men were working at the time of this accident was being used in the work of making the main line of that railroad safe for travel, wasn't it?

A. Yes, sir.

Q. What kind of traffic was hauled over that main line?

A. Usually traffic the C. and O. would haul.

[fol. 53] Q. Sure. Passenger and freight or freight only?

A. Coal and freight.

Q. What kind of freight was that?

A. I don't know. I never looked in any of the cars to know.

Q. All coal cars, wasn't it?

A. No, they ran some freight cars besides that.

Q. Almost exclusively coal cars?

A. The biggest per cent.

Q. Where did that coal come from?

A. I couldn't say.

Q. You don't know? Any mined down along there where they could get it?

A. Not that I know of.

Q. Do you mean to say, sir,—look at the jury—that you can't tell the jury where that coal came from on the C. and O. and you working there?

A. Why would I know?

Q. You say you don't know?

A. I don't know when it was mined.

Q. I asked where, not when it was mined.

A. I don't know what state it came from.

Q. Do you know whether it came from the state of Ohio or not?

A. No, I wouldn't know that.

Q. You never heard that coal came from West Virginia?

A. Certainly. But you told me while ago——

[fol. 54] Q. You know where that came from?

A. Absolutely, I don't know it.

Q. You don't know it? Were you working for the contractor at the time or the railroad?

A. Grayley Contracting Company paid me.

Q. I didn't ask that.

A. Part of the time under the orders of the road master for the C. and O and part for Grayley.

Q. At this particular time were you under the orders of the C. and O. or the contractor?

A. The Grayley contractor foreman brought us up there and it would be by the orders of the C. and O.

Q. How long have you worked on that contract?

A. Longer than a year. I wouldn't know how many months.

Q. Did you ever work for the C. and O.?

A. Yes, sir.

Q. When did you work for it?

A. Before I worked there—before '25.

Q. Ever work for them since?

A. No.

Q. Not since 1926?

A. No. I might have worked for the contractor in '27, but I never worked on that job.

Q. What business are you engaged in now?

A. Farming.

Q. Where do you farm?

A. Down about Wakefield.

Q. On your own farm or somebody else's?

[fol. 55] A. Just bought lately.

Q. Just began the farming business recently—that right?

A. Yes, I just went on the farm recently.

Q. What did you do before that?

A. Box factory, Columbus.

Q. How long did you work there?

A. About 7 or 8 months.

Q. What before that?

A. Guard at the Pen.

Q. You were guard at the Pen. How long were you guard at the Pen.?

A. I went up there the 22nd of last October.

Q. Mr. Nye help you get that position?

A. Which?

Q. Guard at the Pen.?

A. No.

Q. Who helped you get that?

A. Nobody helped me. I got it myself.

Q. Did you have this chisel in your hands, in your possession?

A. No sir, I don't think so at any time.

Q. You never picked it up and looked at it?

A. Not that I remember of.

Q. The nearest you were to it was about 30 some feet?

A. Yes, sir.

Q. Are you acquainted with Mr. Nye?

A. Know him when I see him.

Q. Mr. Parker?

[fol. 56] A. Same way.

Q. How did they happen to find out you were holding this bar some 30 feet away?

A. Who? Nye and Parker?

Q. Yes.

A. I don't know as to that. There was talk there quite a bit before this other trial.
Q. You didn't testify at the other trial?
A. No.
Q. They didn't call you as a witness at all?
A. No, sir, they didn't call me.
Q. They had you here?
A. Yes, sir.
Q. As a witness?
A. Yes, sir.
Q. Didn't call you?
A. No, sir.

Redirect examination.

By Mr. Nye:

Q. Do you know Henry Bannon, this man right here?
A. No.
Q. That courteous gentleman right there?
A. No.
Q. He helped you get a job on the C. and O.?
A. No.
Q. That wouldn't affect your testimony? That had nothing to do with the case? Just about as silly as the rest of [fol. 57] his questions.

Objection.

By the Court: The Jury is instructed not to pay attention to the remarks of counsel.

I am going to say now for the last time that attorneys will be requested to address their remarks to the Court.

[fol. 58] Thereupon one CHARLES HENSON was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. What is your name?
A. Charles Henson?

Q. Where do you live?

A. Union township.

Q. How long have you lived there?

A. 25 years, I guess, George.

Q. Were you employed on the C. and O. on February 8, 1926, when Mr. Kuhn lost his eye?

A. Yes, sir.

Q. What were you doing that particular day?

A. I was working around there at whatever they told me to do.

Q. And what were you doing when Mr. Kuhn's eye was put out?

A. I think I was tightening up some bolts on a joint.

Q. Do you know what Mr. Kuhn was doing at the time?

A. Mr. Kuhn and I were together just before I started to do this work and the boss told one of us to do that. I worked on up to where they were cutting the rail to take turns to strike with the sledge and it wasn't very long after we started until the word came to me that his eye was knocked out—probably 2 or 3 minutes.

[fol. 59] Q. How far away were you when this occurred?

A. I don't know whether it was 2 or 1 rail. 1 or 2 rails back from where they were working, maybe 60 feet. If it would be 2 rails it would be 66.

Q. Did you have an opportunity to examine this chisel?

A. No, sir, I didn't.

Q. You don't know the condition of this chisel?

A. No, sir. I never struck with the hammer or had the chisel in my hand.

Q. Did you see any goggles on the job?

A. No sir, not until after this happened.

By Mr. Bannon: Objection, and motion to strike out the last part of his answer.

By the Court: Yes, beginning with the word "not" strike out and the jury is instructed to disregard it.

Q. Now, Mr. Henson, where was it, and where was the work going on?

A. Just beyond where Apex stands.

Q. Where with reference to the main track at the time Mr. Kuhn lost his eye?

A. He was working right at the switch where it goes on the main line, putting switch in there on that dirt track—loading track, I reckon they call it. Had the shovel in there.

[fol. 60] This was the switch that went off the main line, off to the right.

Q. Working on the switch?

A. Right close to the switch.

Q. Right close but not on it?

A. I don't think they were right on the switch. I couldn't say.

Q. Where were they hauling this particular dirt from, if they were?

A. Mr. Grayley had a shovel in there and they dumped it below there on some of those fills.

Q. And were any freight cars used over this rail that he was cutting?

A. Well, I don't know whether they ever run anything in there or not. I can't remember about that.

Q. What was this cut being made up the line for?

A. There was only a single track there. I suppose for to get ready for a double track.

By the Court: Not what you suppose.

A. I don't know.

Q. Did they make a double track?

A. Yes, they did.

Cross-examination.

By Mr. Bannon:

Q. Mr. Henson, when did they have a double track there?

A. Well, they got a double track now. I don't know.

[fol. 61] Q. I say when did they put in that double track at that place?

A. Just as soon as they got thru. They have finished it up. Made it clear thru.

Q. How long was that after this accident?

A. Well, I don't know. I can't tell you.

Q. Can't you give us any idea?

A. I don't know. It was quite a while before they got thru.

Q. You know when the accident happened?

A. It happened in February.

Q. Of what year?

A. I couldn't say now.

Q. You can't recall that now, can you?

A. No, sir.
Q. You can't recall when they double tracked?
A. No, sir.
Q. You can't recall that now?

—. ——

Q. As a matter of fact, the double track on that line was not completed until very recently, was it?
A. Well, it's been run I reckon a year or two. Couple of years thru there.
Q. Just finally completed yesterday?
A. Yes, but not there. It was completed yesterday, I guess, and all the way thru. Put the first train thru so I hear.
Q. Had the railroad had some trouble with slipping that was pushing out the track on the main line?
A. Yes, they had.
[fol. 62] Q. And were they removing earth from that slip in order to prevent further movement of the main line?
A. They wasn't moving from the side the dirt was coming in on. They were moving on the other side.
Q. That would be to relieve the pressure, wouldn't it?
A. I don't know. The dirt was coming in on the east side of the track and they were working on the west side.
Q. The fact of it is, you were just there doing section hand's work?
A. Yes, sir.
Q. You don't know what object the railroad had in view in moving that earth at that particular time?
A. No, sir. We could hear things. None of the officials never told any of us, but we could hear things, and that's all we knew about it.
Q. But of your own personal knowledge you don't know anything about that?
A. I don't know. I supposed they were doing it to put in a double track.
Q. You just supposed that?
A. They had a double track in here.
Q. Afterwards?
A. As soon as they got the cut thru.
Q. You do know there was a slip there?
A. Yes, sir.
[fol. 63] Q. And you do know the slip was interfering with the railroad track that was already there, the main track, didn't you?

A. Yes, sir. They had to move that. They did move it.
Q. And had to move that track, didn't they?
A. Yes, sir, to the right.
Q. And you know they had to remove some earth that was slipping?
A. I know they were moving it any way. I don't know whether they had to. They did do it any way.

Redirect examination.

By Mr. Nye:

Q. Did you testify at the other trial?
A. Yes, sir.
Q. Mr. Bannon's stenographer took the testimony?
A. I don't remember who did, but I testified. I remember that.

By Mr. Nye (addressing the Clerk): Will you look on the record and see who took the testimony before?

Objection.

By the Court: If you are going to do this in the presence of the jury, let the record show it. We thought that was made clear in the beginning that any remarks or argument [fol. 64] made by the attorneys will be made to the Court alone and not in the hearing of the jury. The same with any desires of counsel, except the questions to the witness, until the Court permits counsel to argue the case. Now, is that clear to both counsel, for defendant and Plaintiff? We expect that to be followed out. Is there anything further with your witness?
By Mr. Nye: That's all.

[fol. 65] Thereupon one Corbet Zimmerman was called as a witness on behalf of plaintiff and, first duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. What is your name?
A. Corbet Zimmerman.

Q. Where do you live, Mr. Zimmerman?
A. Wakefield, now they call it.
Q. How long have you lived in this county?
A. All my life.
Q. Were you working on the C. and O. when Mr. Kuhn's eye was knocked out in February, 1926?
A. Yes, sir.
Q. What were you doing at that particular time?
A. Waiting on my time to use the maul.
Q. Who else was waiting there?
A. I don't know them all.
Q. Had you struck with the maul yet?
A. I had not took my turn yet.
Q. Why were you standing there if you were just waiting?
A. Had orders there.
Q. Who ordered you?
A. Sturgil.
Q. Do you know whether the order included Mr. Kuhn in that order or not?
A. He said, all of you. I reckon he did.
Q. What position was Mr. Kuhn in if you know when his eye was struck with this steel?
[fol. 66] A. He was standing straight up as near as I can say where they were cutting.
Q. Was it his turn, if you know?
A. No, sir.

Objection.

A. He had took his turn.

By the Court: The form may be bad. Counsel will watch. He may answer the question. Do you know when he was to strike?

A. No, I don't. Whoever got the hammer first, I suppose.

Q. Where was he with reference to the man who had just struck with the maul?
A. You mean how close?
Q. Where was he with reference to the rest of them and to the man striking with the maul? Was he next to that?
A. Yes, he was on the same side of the rail, as near as

I can recollect, and about 7 or 8 feet from them as near as I can recall, from the fellows that were striking.

Q. Was anybody else closer to the man striking than Mr. Kuhn?

A. I don't recollect.

Q. Where were you standing with reference to where Mr. Kuhn was standing?

A. Right up against him. Right up against his shoulder.

[fol. 67] Q. Did you examine the chisel that was being used on that job?

A. Never picked it up myself but I saw it.

Q. What was the condition of it?

A. It was bad.

Q. In what way was it bad, Mr. Zimmerman?

A. It had been battered down until there were slivers supposed to be around. It was battered until the pieces were battered away from it, flying away from it.

Q. You stated awhile ago that you and Mr. Kuhn and the rest of them were ordered to do a certain thing in connection with this rail cutting, do you remember the words that were used by the foreman?

A. Not nothing only, Gang up around here. Take your turns.

Cross-examination.

By Mr. Bannon:

Q. That's the usual form of instruction, isn't it?

A. What did you say?

Q. That's the usual form of instruction that the foreman uses on a job of that kind—gang up and take your turns?

A. We are supposed to obey his rules.

Q. That's the usual instruction that a foreman gives you on a job of that kind—gang up and take your turn?

A. Yes, sir.

[fol. 68] Q. How many of you men did gang up and take your turns?

A. I don't think there were many on the job that shirked and stood back.

Q. Didn't anybody shirk his job?

A. No.

Q. About how many were there there to do the work of wielding the maul?

A. That would be a guess for me.

Q. Let's think. See if you can't recall who was there. See who you can recall. See who was there or give us some idea how many were in that gang to wield the maul.

A. I don't know.

Q. Do you think there was as many as 8 or 10?

A. Yes, there would have been that many.

Q. That many any way?

A. Yes, sir.

Q. That right? Can you name some of the men that were there wielding the maul?

A. Oh, yes, I can name the man that was using it. Ben De Lay was using the maul.

Q. At the time of the accident. But you can't recall those that were waiting to use the maul?

A. I suppose in all that there was waiting—there was the whole gang. All these witnesses here were waiting.

Q. 8 or 10?

A. Yes, I expect that many witnesses here that were waiting.

[fol. 69] Q. Had Kuhn just used the maul before the accident?

A. I guess maybe he had.

Q. And you say the tip of the chisel was battered?

A. Yes, sir.

Q. And you say splinters were flying from it?

A. They surely must have been flying from it.

Q. Did you see any flying from it?

A. You can't see them.

Q. Did you know of any splinters flying from this chisel other than the one that struck Kuhn?

A. Oh, no.

Q. You don't know that. So that you don't want the jury to understand from your testimony that there was others than this splinter which struck Kuhn, that you know of other splinters flying from that particular chisel while it was being used on the job?

A. They might. Nobody could see them pieces flying. There could have been pieces flew and nobody saw them. That was the only piece I knew of that flew off.

Q. That was the only piece you knew of striking anybody about there doing the work?

A. Yes, sir.

Q. So far as your knowledge goes that's the only piece of steel that you know of that came from that chisel?

A. Oh, yes, the only one I know of.

[fol. 70] Q. Now, you say that Mr. Kuhn was facing the work that was going on?

A. No, it would be kind of side, as near as I can recollect, it would be at the side.

Q. That is the left or right side?

A. Left side as near as I can recollect.

Q. You think his left side? That would be the side that his eye was put out?

A. Yes, sir.

Q. You didn't have the chisel in your hand yourself?

A. No, sir.

Q. You didn't hold it at any time?

A. No, I had not held it any time.

Q. Do you remember who was holding it?

A. Yes, I know him but I can't call his name. He was—we call him preacher.

Q. Preacher Woodrow?

A. I think that was his name.

Redirect examination.

By Mr. Nye:

Q. Describe what happened with reference to Mr. Kuhn at the time this piece of steel struck his eye?

A. When the steel got his eye, he just threw his hand over his eye and he turned around and he said, I believe——

Objection.

Overruled.

Exceptions.

[fol. 71] A. Put his hand over his eye and turned around to me and at that time I pulled his eyelid open. I was the first one that looked in his eye, and I pulled his eye open. He had it shut tight. It ran over his britches like molasses when it popped out.

Q. What do you mean?

A. The inside of the eyeball.

Q. You say it ran down about like molasses?

A. Yes, as near as I could tell, it looked like it might be sticky.

Q. Were there any goggles on the job that day?

A. No, none at that time.

Recross-examination.

By Mr. Bannon:

Q. If there had been goggles there, who would have used the goggles?

A. Why the ones that was the hammer users and the chisel holders.

Q. In other words, if they had been using goggles the man who was holding the chisel when it was struck by the maul, he would have on a pair of goggles, and the one wielding the maul would have on a pair of goggles, but the ones that were standing back, they wouldn't be using goggles cutting the rail?

A. No, but they should be back a good ways—that's backwards.

[fol. 72] Q. Were you back a good ways?

A. Not very far.

Q. But that isn't the way that works. The way you are accustomed to doing that work—those men that were in the gang waiting for their turn would not be wearing goggles?

A. They wouldn't be supposed to wear goggles.

Q. Be just 2 pair. One for the hammer man and the other for the chisel?

A. As near as I know that is about right.

Redirect examination.

By Mr. Nye:

Q. You said you were standing next to Mr. Kuhn?

A. Yes, sir.

Q. Why were you standing up that close?

A. We had orders to stand there, gang up around here and don't be afraid.

[fol. 73] Thereon one JOHN SMITH was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name please?
A. John Smith.
Q. And your residence is where?
A. In Beaver.
Q. Near Beaver?
A. Mile of Beaver.
Q. Were you employed on the C. and O. February 8, 1926, the day Mr. Kuhn lost his eye?
A. Yes, sir.
Q. Were you in the same gang?
A. Yes, sir.
Q. What were you doing there at that particular time?
A. I was helping cut the steel until they called me for a track gauge and I handed the maul to Mr. Kuhn.
Q. You mean at the time the piece of steel entered his eye?
A. Yes, he had his eye knocked out before I got back with the track gauge.
Q. How long was it that you were gone?
A. Something like 20 or 25 minutes, I judge.
Q. Did you hear Mr. Kuhn get his orders before you left as to cutting the rail?
A. I don't just remember, it's been so long.
[fol. 74] Q. Did you hear Mr. Sturgil say anything?
A. He was hurrying us all up to get the steel cut and put it in when he sent me after the track gauge.
Q. Did you observe that chisel?
A. Pretty bad condition. Had 4 or 5 all battered up pretty bad.
Q. Do you know whether there were any goggles there at the time?
A. No, sir, there wasn't no goggles there on the line.

Cross-examination.

By Mr. Bannon:

Q. Of course, everybody knew there were no goggles?
A. Yes, sir.

Q. And did you have a chisel in your hand?

A. I picked up one of them.

Q. This chisel that was used in cutting this rail?

A. No, I didn't have it in my hand. I was using the maul all the time.

Q. How do you know that the chisel was in bad condition?

A. I got that that morning when we went to cut—the chisel.

Q. I am not talking in reference to all the chisels. Do you know about this particular one?

[fol. 75] A. I fetched him the chisel on the line they were using that morning.

Q. Did you have this particular chisel in your hand at any time that morning?

A. Anything said, I couldn't remember.

Q. How do you know it was in bad condition if it was not the same chisel?

A. They were all bad chisels. I know that much when I went and got them.

Q. Do you know whether one of those chisels was used in this work?

A. Yes, sir, the chisels we fetched on the job were used in cutting that steel.

Q. More than one chisel used in cutting the steel?

A. I judge there was.

Q. Not what you judge, but what you know.

A. That's been so long I couldn't just state how many chisels we did use.

Q. How far away were you from this place of accident when it happened?

A. I have an idea a quarter of a mile up the railroad track.

Q. Quarter of a mile. How long had you been away from this place where this rail was being cut?

A. When he got his eye knocked out, you mean?

Q. Yes.

A. About 30 minutes, I have an idea.

Q. The fact of it is now Mr. Smith, you don't know what chisel was being used at that time, do you?

A. No, sir, I don't know what chisel was used.

[fol. 76] Q. You can't say having been away from the job 30 minutes whether the chisel in use at that time was good or bad?

A. No, but what chisels was on the ground when I left were in bad condition. I wouldn't know what chisel it was knocked his eye out.

Q. You don't know whether it was one of those chisels or not?

A. No, I wouldn't say that it was.

Q. The condition of those chisels was battered and so bad you could tell by looking at them?

A. Yes, sir.

Q. If a man had all of them in front of him he could see whether that chisel was battered?

A. Yes, sir.

Q. Apparent to him?

A. Yes, sir.

Q. Anybody could tell that?

A. Yes, sir.

[fol. 77] Thereupon one JESSE IRWIN was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. What is your name, please?

A. Jesse Irwin.

Q. And where do you live?

A. At Beaver.

Q. Were you employed on the C. and O. February, 1926, when Mr. Kuhn was struck by a piece of steel that put his eye out?

A. Yes, sir.

Q. What were you doing there that morning?

A. I was putting on a pair of angle bars.

Q. How close were you to where Mr. Kuhn was?

A. I was probably between 30 and 35 feet.

Q. Did you hear him get his orders along with the rest of them?

A. No, sir.

Q. You didn't hear that?

A. I wasn't quite close enough.

Q. Did you hear Mr. Sturgil say anything?

A. No, sir.

Q. Did you examine the chisel that was used there?
A. No, I didn't see the chisel. Just as soon as this happeneo, I was the only one that had a machine there and they asked me to bring him to the doctor. I brought him to the doctor. Consequently, I didn't see the tools.
Q. Did you see goggles there?
A. No sir.

[fol. 78] Thereupon one JAMES DAVIS was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name is James Davis?
A. Yes sir.
Q. Where do you live, Mr. Davis?
A. 3 mile and a half north of Beaver.
Q. Were you working on the C. and O. when Mr. Kuhn got his eye put out in 1926?
A. Yes, sir.
Q. What were you doing?
A. I was helping surface track.
Q. What is that?
A. To put ballast on, gravel, whatever you might call it.
Q. How far were you from where Mr. Kuhn was?
A. About half a rail back.
Q. How far would that be?
A. According to how long the rail is.
Q. What was the approximate distance between you and Mr. Kuhn?
A. Wasn't very far. About half a rail.
Q. That would be 15 feet?
A. Yes, be that far or a little farther.
Q. 20 feet?
Q. Something like that.
Q. Did you see Mr. Sturgil there, the foreman?
A. Yes, sir.
[fol. 79] Q. Did you hear him say anything?
A. Oh, he kind of hurried them up a little.

Q. Did you hear him say anything else with reference to cutting steel rails?

A. No, I didn't hear him say anything to hurt anybody.

Q. What do you mean by that?

A. Oh, well, I didn't hear him say anything bad, out of the way; just hurrying us men up a little.

Q. Did you hear him say to gang up there and get those steel rails cut?

A. No, I didn't hear him say that.

Q. Were there any goggles there on the job?

A. I didn't see none.

Q. Did you know where the goggles were kept?

A. No, sir, I didn't.

Q. How long had you worked on the job?

A. I expect I had worked there a year or better, I expect, maybe.

Q. Whom were you working for?

A. Otis Balsworth.

Q. Working for Galford?

A. This Jim Galford was one of the main foremen at the time.

Q. Mr. Galford still on the railroad?

A. No, I don't reckon he is.

Q. You still work for the railroad?

A. Yes sir.

Q. Where?

[fol. 80] A. I work for Mr. Pete.

Cross-examination.

By Mr. Bannon:

Q. Mr. Davis, did you see the tools that were used, the maul and chisel?

A. I never seen them. I didn't pay any attention. I wasn't working with them. I was just working with the shovel.

[fol. 81] Thereupon one MATT BROWN was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name please?
A. Matt Brown.
Q. Where do you live?
A. Beaver.
Q. Were you working on the C. and O. when Mr. Kuhn got his eye put out?
A. Drawing spikes.
Q. How far away from Mr. Kuhn were you?
A. I assume I was about 6 feet.
Q. What were you doing?
A. Drawing spikes.
Q. Along the same rail he was working on?
A. Where they had taken the rail up in order to lay it back as quick as it was cut off.
Q. Did you see Mr. Sturgill around there?
A. Yes, sir.
Q. Who was in charge of this steel rail cutting?
A. Well, it seemed that Mr. Sturgill was.
Q. Did you hear any issuance of orders in reference——
A. Yes, I think he issued orders to the crowd of them to take a hand when one man was winded in order to get it done quick.
Q. Any goggles on the job that day?
A. I didn't get you.
[fol. 82] Q. Were there any goggles on the job that day before this hurt?
A. Troubles?
Q. Were there any goggles on the job before his eye was put out?
A. I had not seen any.
Q. Did you examine the chisel?
A. I did not.
Q. Well, where was Mr. Kuhn standing at the time this entered his eye?
A. He was standing—I can't be exact for I never measured the distance, but I suppose he was within about 3 wide steps from where they were cutting the rail.

Q. Where was he standing with reference to the man who was doing the striking and with reference to where the others were?

A. He was standing direct between me and the man that was cutting the rail.

Q. Was there anybody else closer to the men that were doing the cutting than Mr. Kuhn?

A. Not that I know of. I never seen any one any closer.

Q. Do you know who was to strike next?

A. I presume he was to strike next. We had orders to crowd up there and had orders to take it. I guess that was his spell.

By Mr. Bannon: Motion to strike out "I guess."

By the Court: The jury will disregard the answer of the witness as to what he guesses.

A. That was the orders we had, Judge.

[fol. 83] Cross-examination.

By Mr. Bannon:

Q. How many were in that gang using the maul?

A. Only 2. One working the cutter and one striking.

Q. How many were in your gang who would take turns using the maul?

A. The whole bunch was supposed to.

Q. I know; but how many were in that bunch?

A. I can't say.

Q. About how many? Give us your best idea.

—. Probably half a dozen.

Q. And do you recall who was using the maul at the time Kuhn was hurt?

A. Ben De Lay was using the maul.

Q. Who was using the maul just before Ben De Lay?

A. I can't say.

Q. If Mr. Kuhn had used the maul just before Ben De Lay *when* it wouldn't be his turn until 5 or 6 others had used the maul, would it?

Objection.

Overruled.

A. I don't know *what* Mr. Kuhn used the maul before Ben De Lay.

Q. I said if he had used the maul just before Ben De Lay then it wouldn't be his turn again until 5 or 6 others had used the maul?

A. Not in that case, but I don't know that would be the case.

Q. There was nothing unusual in what Mr. Sturgil said [fol. 84] for the men to gang up there, to crowd up, and take a hand, and get the work done quick, was there?

A. Yes, he was a little rash with it.

Q. Isn't that frequently done—an order issued like that?

A. Yes, generally.

Q. Generally the way they talk to the men—crowd up, get in a gang, get the work done quick?

A. Generally the case among railroad men.

Q. Isn't that the way, the expression you hear, several times a day—hear the expression "gang up" many times? These men work in a big crowd like that, don't they?

A. Don't know as I ever heard it used any about cutting steel.

Q. There was 6 or 8 to do the work with the maul, wasn't there?

A. Could have been 6 or 8. I don't know positive, but there was some bunch of us.

Q. It wouldn't do in a case of that kind to have the bunch strung all along the railroad track to do that, would it?

A. No.

Q. They get in a little crowd. One uses the maul until he gets tired and he gives it to the other and he turns around and goes to the rear of the crowd so as to fall in line for his turn?

A. They don't line up like that.

[fol. 85] Q. He gets in back of the others after he has used the maul?

A. That's generally the custom, yes.

Q. Get that perfectly clear. One uses the maul—6 or 8 altogether in the crowd—and after he has struck and gets a little tired, that man goes to the rear—he steps back in line so the others can come take their time?

A. Generally.

Q. Nothing unusual about that, is there?

A. No, not as I know of.

Q. Nothing unusual about telling the men to get their work done?

A. Little unusual to be talked to as rough as we were.

Q. You are referring to the manner of his speech?

A. Yes, sir.

Q. But it isn't unusual to tell the men to be quick and get the work done?

A. Right smartly so to rush men on public works.

Q. Unusual to tell men to be quick on public works?

A. This is a public affair.

Q. Had it not been a public affair there would not have been anything unusual about it?

A. Been personal, no, it would not.

Q. If it had been personal work it would not have been unusual, but being on public work, like railroad work, something like that, you must not tell men to hurry and get the work done quick—is that your idea about it?

(No answer.)

[fol. 86] Thereupon one BEN DE LAY was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name please?

A. Ben De Lay.

Q. Where do you live?

A. I live in Seal township, I believe. No it's Union. I am mistaken in telling that fellow yesterday. It's Union.

Q. What fellow was that?

A. That fellow that's been writing our names down back there where we were sworn in.

By the Court: He evidently means the Clerk. He wanted to get the mileage, didn't he?

A. Yes, sir.

Q. Were you working on the C. and O. when Mr. Kuhn lost his eye?

A. Yes, sir.

Q. What were you doing at that particular time?

A. Striking a cold cut with a hammer.

Q. What is a cold cut?

A. Little piece of steel about that high and big end on one end—the top—and sharp on the other, and a hole in the middle for a handle.

[fol. 87] Q. What were you doing at this particular time?

A. I was hitting it.

Q. With a sledge?

A. Yes, sir.

Q. Is it customary to strike with all one's strength?

A. You do as hard as you can.

Q. Did you handle that chisel?

A. No, I didn't. It wasn't in very good shape. They had to pick over 7 or 8 to get this one.

By Mr. Bannon: Objection to anything he volunteers after he answers his question.

By the Court: Yes, your motion will be sustained.

Q. Did you see them examine the chisel you say?

A. They put one on, then I made a lick or two, then they got another one, I think, as I can remember.

Q. How about the one you were striking at the time he lost his eye?

A. It wasn't a very good one to look at, the head of it.

Q. Any goggles?

A. No goggles until after his eye was knocked out.

Objection.

By the Court: Sustained. The jury is instructed to disregard the latter part of his answer beginning with "until."

[fol. 88] Q. Where did they keep these goggles?

A. Kept them in the tool house.

Q. Customary to use goggles?

A. All the time they are supposed to use them.

Q. How about Mr. Sturgil, did you see him there?

A. He was there.

Q. What was he doing?

A. They sent him up to help put that switch in.

A. That's the switch we were putting in.

Q. Was he in charge of you fellows at the time?

A. He was telling us what to do as far as I can remember. He was putting us at one thing and then anothr. He said to hurry up and get it in. They told him to hurry, I guess,

because they wanted to use that side track and we were doing our best to get it in.

Q. Who struck right before you, if you remember?

A. I think Bill done the striking before I did or was going to rest me right after me. I couldn't remember which.

Q. How was that?

A. He done struck before I think and he was going to take my hammer and let me rest a little bit. He was coming up to get it or coming to let me rest. We were doing the striking.

Q. Any others there?

A. Several handling the rail.

Q. Any others there?

A. No. Just Bill and me was doing the striking.

[fol. 89] Q. Whose turn would it have been next then?

A. Been Bill's turn next if he had before I did. I don't know whether he was going to get my hammer or whether he just done struck. I don't remember now.

Cross-examination.

By Mr. Bannon:

Q. In other words, you don't remember whether Kuhn, the plaintiff, had used the hammer just before or was going to use it after?

A. No, sir, I don't think I do.

Q. You didn't examine the chisel after the accident, did you?

A. No, sir, I didn't.

Q. You didn't really notice the chisel at all?

A. I might have half way. It had a pretty good sized head on it. I just kept hittin' away. It was battered out.

Q. An inch and a half in diameter?

A. Be a little more than that I think.

Q. Was the head of the chisel battered, or what you call burred?

A. I think it was something like that. Great big head on it. When they are new they got a little bit of a head.

[fol. 90] Q. In other words, its not a new chisel?

A. No, sir.

Q. The chisel had been used?

A. Yes, sir.

Q. Anything ususual about the chisel except that it had a large head on it?

A. Yes, it had a large head on it.

Q. Had you struck the chisel upon more than one occasion?

A. You mean more than one turn?

Q. Yes.

A. I don't remember. Bill had been striking before I was and he was going to get it. I was striking before, I know that.

Q. If Kuhn had struck before you he wouldn't have struck then until some time after because there were several in the gang?

A. Just Bill and me striking the rail. We were going to cut her off.

Q. Weren't there several in that gang? Aren't you mistaken about that?

A. Several in the gang. Nobody took out hammer that morning. We were cutting ourselves. They were helping haul the rail.

Q. Well, then if others here who were members of that gang said that 6 or 8 of them, if they said they used the hammer, and were there to take their turns at the work, then they are mistaken about it?

[fol. 91] A. As far as I know. I don't remember of anybody cutting only Bill and me.

Q. You don't remember only you and Bill?

A. That's all I remember.

Q. If the accident had not happened you wouldn't remember who had hit or anything of that kind?

A. Yes, I think I would as long as I was cutting.

Q. At what time do you judge this accident happened?

A. I forgot that now.

Q. You don't remember?

A. I think it was in February. I wouldn't say for sure. I was just guessing at that; so long I have forgotten.

Q. Do you know where the steel came from that struck Mr. Kuhn in the eye?

A. No, sir, I don't.

Q. Nobody knew that?

A. Came from somewhere. We don't know where it came from. No way possible. You couldn't see it, of course.

Q. It came from the rail or the chisel or the maul?

A. Didn't come from the maul, I don't think. There was nothing chipped from the maul. It came from the rail, I think, but you couldn't tell.

Q. So it came from the rail or chisel.

[fol. 92] Thereupon one FRED MOSSBARGER was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q Your name is Fred Mossbarger?

A. Yes, sir.

Q. Where do you live?

A. Out there by Zohn's corner, about 2 mile.

Q. You — working on the C. and O. with Mr. Kuhn when he got his eye knocked out?

A. Yes, sir.

Q. What were you doing?

A. Helping lift the rail.

Q. How far were you from Mr. Kuhn at the time?

A. I judge about 10 feet.

Q. Did you have any goggles on?

A. No, sir.

Q. Do you know whether there were any goggles or not?

A. Yes; in the tool house.

Q. Was this a job they were taking their time on or was it a hurry up job?

A. It was a hurry up job.

Q. Who was striking at the time?

A. Ben De Lay.

Q. Did you hear any one issue orders there as you were cutting your rails?

A. Yes, sir.

Q. Who was that?

A. That was Sturgil.

[fol. 93] Q. What did he say?

A. Told us to get a move on us.

Q. Did he say anything further?

A. I don't know. After Bill got his eye put out I brought him to the doctor.

Q. Before that did you hear him say anything about getting up closer or anything of that kind?

A. Yes, sir.

Q. What did he say?

A. Told us to get up there and get that rail cut.

Q. Now, in cutting the rail, just what is necessary from the men? Does it take some men to hold the rail?

A. Yes, sir.

Q. What else would they have to do in connection with that?

A. Well, it takes some man to lift it up and put the angle bar under it, hold the cutter and hammer.

Q. What is the anchor bar?

A. That's — plate that goes under. We hold that on to cut that.

Q. Is that anchor bar or angle bar?

A. Angle bar.

[fol. 94] Cross-examination.

By Mr. Bannon:

Q. How many were in the gang there cutting this rail?

A. Well, I don't remember.

Q. Give us some idea about how many?

A. Well, I judge about 4 or 5.

Q. They were the ones who would use the hammer?

A. Yes, sir.

Q. And somebody else—one man held the chisel? Who was it that held the chisel?

A. Preacher Woodrow.

Q. In other words, the preacher held the chisel and these 4 or 5 other members of the gang would take the hammer and take turns striking the chisel?

A. Yes, sir.

Thereupon said witness was permitted to leave the witness stand.

[fol. 95] Thereupon FRED MOSSBARGER was recalled and testified further as follows:

Redirect examination.

By Mr. Nye:

Q. Just two or three more questions I want to ask you. How many rails were cut that morning?

A. Well, there was only one cut while I was there.

Q. Which one were they cutting on at the time his eye was put out?

A. I think it was the first one. I know most it was.

Q. Are you positive about that?

A. The first rail. That's the first one we had cut that morning.

Q. How long had that been worked on, cutting?

A. It had not been very long.

Q. How long does it take ordinarily to cut thru steel rails?

A. If you got good tools it will take about half an hour.

Q. How about the tools in this particular instance—were they good?

A. They were no good.

Q. Did you examine the chisel?

A. No, sir.

Q. Did you see the chisel?

A. I seen all of them.

Q. What was the condition of this chisel?

[fol. 96] A. It was all battered up.

Recross-examination.

By Mr. Bannon:

Q. You didn't have this particular chisel that was being used to cut this particular rail in your hand, did you?

A. No, sir.

Q. Did you use the hammer at any time to strike this rail?

A. I never got the chance.

Q. I am asking whether you used the hammer to strike this chisel?

A. Sometimes I do.

Q. This chisel in use at the time Kuhn got his eye hurt, did you use the hammer on that chisel?

A. No sir, not that morning, I didn't.

Q. Where were you engaged in work at the time he was working?

A. I was helping there.

Q. How far away were you from this crowd?

A. About 10 feet.

Q. And you were putting on an angle bar?

A. We had the angle bar under the rail. We had put it under that.

Q. And you were engaged on that?

—. —— ——.

[fol. 97] Q. Did you see this chisel in the place where they were cutting this rail?

A. Yes, sir.

Q. And from the position where you were 10 feet away?

A. Yes, sir.

Q. And could you tell from there that the top of the chisel was battered down?

A. Yes, sir.

Q. After a new chisel has been used a while being struck with a hammer, it always becomes battered down, doesn't it?

A. Yes, sir.

Q. And this was just in the same condition in so far as the top is concerned that any used chisel would be, wasn't it?

A. Yes, sir.

Q. And the condition that this chisel was in if apparent to you would be apparent to any man who might be closer to it and striking it with a hammer, wouldn't it?

A. Yes, sir.

Q. In other words, in order to strike the chisel with the hammer one must put his eye right on the chisel when he strikes with the hammer and whatever condition that chisel was in the man that was using it was using the hammer would know, wouldn't he?

A. Yes, sir.

[fol. 98] Thereupon one GEORGE MOSSBARGER was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name is George Mossbarger?
A. Yes, sir.
Q. What relation are you to Fred Mossbarger?
A. First cousin.
Q. Were you working on the C. and O. on the same day Mr. Kuhn got his eye put out?
A. Yes, sir.
Q. What were you doing at that time?
A. Helping handle the rail.
Q. Who was striking, if you know, with the maul?
A. Ben DeLay was one and Bill Kuhn and I don't know whether there was anybody else or not. At the time the eye was put out?
Q. Yes.
A. Ben DeLay.
Q. This the first or second rail they had cut?
A. I don't remember that.
Q. Did you see any goggles there before this accident?
A. No, sir.
Q. What was the condition of this chisel, if you know?
A. I didn't pay much attention to the chisel. I wasn't using it and I didn't pay any close attention to it.
[fol. 99] Q. Did you hear Mr. Sturgill issue any orders there?
A. He said, Let's get this rail in right now. Kind of hurried around there. I think Bill called him that morning about rushing things. I know he said something about it.

[fol. 100] Thereupon one CHARLES HAMMERSTEIN was called as a witness on behalf of plaintiff and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Nye:

Q. Your name please?
A. Charles Hamerstein.

Q. Where do you live?

A. Beaver.

Q. In February, 1926, were you working on the C. and O. when Mr. Kuhn had his eye put out?

A. I was.

Q. What were you doing at that particular time?

A. That morning Mr. Sturgil came on the job and rushed us in and we were going to put in a switch and grade to haul out earth. Mr. Sturgil wanted to rush us and I got mad.

Objection.

Sustained.

A. I had been helping cut that rail, and I stepped back. I got out of humor, and there was some orders to go down the track a short distance to help ballast the track. I didn't want to have any controversy with Mr. Curtis.

By the Court: Don't tell the jury what you thought. Tell what happened.

A. Wasn't the question put to me, what was I doing?

[fol. 101] By the Court: What you were doing; not what you were thinking. He means what occupation you were doing when the accident occurred.

A. I went to ballast the track when the accident happened, probably 30 yards down.

Q. Did you see a cold chisel?

A. I must, for I believe I had been striking before, but I had not paid any great amount of attention to it. I wasn't choicy about the tools. There were tools to work with.

Q. Did you hear any orders issued there as to cutting the rails?

A. I heard orders to hurry up. Something said about getting that switch in. Step up close. Be ready to relieve that man that's hammering.

Q. Did you see any goggles before this occurred?

A. No, sir, I did not.

Cross-examination.

By Mr. Bannon:

Q. Did you see Mr. Kuhn strike with that hammer?

A. I couldn't say positive about that, but I think he and

I were both about the same time on the same interval but right there in the beginning I think there was a young man there to do that work before he and I.

[fol. 102] By the Court: Not what you think.

A. Excuse me. That's my way of speaking.

Q. Was there a gang there that day to do the work with the maul?

A. There was no particular gang. They called for some of them to come there, for the gang to gather around.

Q. How many gathered up around there?

A. I didn't count them.

Q. Give us your idea. You say there was a bunch of men. About how many were in that bunch?

A. Every day occurrence. I paid no attention to how many were gathered at one certain job or anything of the kind.

Q. That an ordinary occurrence?

A. Ordinary occurrence.

Q. Was that an ordinary occurrence when they were cutting steel rail for the men to gather around and one of them wield the maul and hand it to another and he would wield it?

A. They generally took turn about, but this time we were rushed up about it.

Q. Shortly before this accident happened had Kuhn been down where you were?

A. No, I had been up where he was. I walked down to ballast the track.

Q. Do you know whether he had been using a maul shortly before the accident?

A. It seemed to me he had a short time before. How [fol. 103] long before, I can't say exactly, but Mr. Kuhn and I was right there in the beginning. I decided to work down to the other place.

Q. Did you use the maul at any time?

A. I think I did. I think I said I did. I thought there were younger men than I was and more able to use it, and I walked down to this other place.

Q. Did you and Mr. Kuhn have any conversation at the beginning before he used the maul?

A. Likely there was some. Said some words. Anyway, I think Mr. Kuhn was a little like the rest of the boys—a

little out of humor because we were kind of rawhided there that morning.

Q. In other words, the foreman seemed to be in a hurry and wanted the workmen to work fast?

A. It wasn't the regular foreman, but Mr. Sturgil, the man that came and took the steering wheel that morning.

Q. The men were a little peeved because they were working with a little more speed than usual?

A. Considerably more rush than we were accustomed on public works.

Q. On public works they don't like to hurry?

A. Yes, that's the way I figured it.

Q. That right?

A. That was the way I figured, yes.

[fol. 104] Thereupon one WILLIAM KUHN, the plaintiff, was recalled for further examination and testified as follows:

Direct examination.

By Mr. Nye:

Q. Do you know who brought the chisels on the job that morning?

A. No, I don't.

Q. After you commenced cutting rails, were any more brought?

A. Not that I know of.

Q. Now, what rail was being cut at the time this accident occurred?

A. Well, I stated before——

Objection.

By the Court: You may answer. Objection overruled.

A. The second rail.

Q. How near was the second rail cut?

A. Well, I couldn't just exactly answer that, but somewheres near about one third or one half of the way.

Q. And on the other rail, had there been others helping who were not helping on this rail?

A. Not to my recollection.

Q. How many were striking on the second rail, Mr. Kuhn, if you remember?

A. As I have stated, myself and Ben DeLay and this Mr. Smith, struck on the first. On the second rail, I don't think he was. Mr. Smith I don't think had struck on the second rail.

[fol. 105] Q. Well, when was it your next turn?

A. I was to have been the next man.

By the Court: I believe the witness has testified to that.

Q. Mr. Kuhn, as to the spur that you were working on at the time your eye was put out, will you describe just where this led to and from?

A. Where it led to?

Q. Yes.

A. Well, after it left the main line there was a spur put in there that led up to the steam shovel where they were taking out dirt to widen the roadbed with in order to make out a double track.

Q. Was there later a second track put in there?

A. The second track later? You mean as to the main line?

Q. Yes.

A. Yes, sir.

Q. Now, Mr. Kuhn, using the diagram which I have here showing the line of the railroad, the C. and O., I guess that's practically East and West, instead of North and South. That right?

A. Yes, sir.

Q. Take this point as East and this point as West, where was the spur that you referred to?

A. Right down here.

[fol. 106] Q. Just mark that on the paper, will you please?

A. Where we were working at at that particular time?

Q. Yes. Just mark an x there, will you? And where was the steam shovel?

A. x.

Q. And how far was it from the steam shovel to where you were working?

A. Well, I wouldn't know the exact distance, but I would judge close on to a quarter of a mile up to the steam shovel

from this point down where we were working, close on to it. It might not have been quite that far.

Q. Then, on the East of the steam shovel. What was that?

A. There was nothing but hill and dirt that had slid in. From the shovel on up—they had gone up that far with the shovel—there was no track whatever as to what we call East on the railroad. There was no track there farther than the steam shovel in this spur track.

Q. Had this track, the spur, ever been used by any trains coming thru there?

A. No, sir, had no outlet at this end whatever.

Q. What became later of this spur track along here?

A. Well, this was all taken out and room made for another track, widening the roadbed and also getting rid of their dirt that had already slipped in and this was all used at the end of what is known as the Apex gate.

[fol. 107] Q. You mean where you were working?

A. Yes, I expect that goes a mile or somewheres near. They widened it out all the way down.

Q. Now, as to the dirt that was slipping that you speak of, did that interfere with trains that had been running on the main track?

A. It may have to a certain extent. There was trains going day and night all during that time.

Cross-examination.

By Mr. Bannon:

Q. Mr. Kuhn, the place where you designated on this paper with the x mark where the rail was being cut was down in the neighborhood of the switch point leading into the main line?

A. Leading off the main line?

Q. Well, leading off the main line?

A. Yes, sir.

Q. And where you have marked the location of the steam shovel with an X is the mark right before the letter S in steam, is it not?

A. Right here is where it shows the steam shovel. There's as far as this track went at that time, because I helped build it myself.

Q. And at this time a slide had come in on the right of way of the railroad, had it not?

A. Had been for some time before, we had dirt slide in.

[fol. 108] Q. That had been coming in for quite a while, hadn't it?

A. Quite a while.

Q. What did that slide do to that main track?

A. Kept hooving it up.

Q. How high did that heave that main track up above the regular grade?

A. It was said to be somewhere near—I have no way of knowing, but it was said to be as much as 6 or 7 feet. Maybe more. There may have been not quite that much.

Q. What was the condition of the track with reference to the track where there was no slide?

A. Very good.

Q. Was it as good as other tracks where there had been no slide?

A. At times it was.

Q. And at times it was not?

A. And at times it was not so good.

Q. At times it was very rough, wasn't it?

A. Yes, sir.

Q. And trains moved over that at a slow speed, didn't they?

A. Very slow speed at a hard pull.

Q. That was caused by the elevation in the grade brought about by the slide and the unevenness of the track?

A. To start with it was never taken down the grade. That also interfered.

Q. It couldn't go down to the grade on account of the slip coming in?

[fol. 109] A. Yes, sir.

Q. So the railroad put a steam shovel in there, didn't it, to proceed to remove the earth from this slip?

A. Yes, sir, it answered the same purpose.

Q. I am asking whether they proceeded to remove earth from this slip?

A. Did what they could to it.

Q. What did they do with the dirt that they removed from that slip?

A. Bought land in places to waste that dirt on.

Q. And after they got that slip removed finally and such earth as kept coming in they got that main track in good shape now the same as the rest of the line, didn't they?

A. I have not been over it since.

Q. Well, now, don't you know, Mr. Kuhn, that the removal of that earth that was exerting a pressure on the main track would stabilize the main track along where that slip was?

A. I admitted that a moment ago.

Q. And at that time was not that the purpose for which the work was being done; to fix this bad place that was in the main track—not what you did afterwards, but at that time?

A. I have no way of knowing that.

Q. But it did do that?

A. They were only widening the roadbed and doing that at the same time.

Q. That work did stabilize that main track, didn't it?

A. It was said to be. I have not been over it.

[fol. 110] Thereupon paper marked "Plaintiff's Exhibit 1" was introduced in evidence, admitted, so marked, attached hereto and made a part hereof.

Here plaintiff rested his case.

And the foregoing was all the evidence offered by the plaintiff in chief.

[fol. 111] Thereupon one L. Rosemire was called as a witness on behalf of defendant and, first being duly sworn, testified as follows:

Direct examination.

By Mr. Bannon:

Q. Where do you live, Mr. Rosemire?

A. Sciotoville.

Q. How long have you lived at Sciotoville?

A. I lived this last time, this year. The first time, 4. Altogether, 10 years.

Q. Were you employed by the C. and O. in 1926?

A. Yes, sir.

Q. On what division?

A. On what is called the North Suodivision of the C. and O.

Q. And in what capacity?

A. Supervisor of work.

Q. How long had you been employed?

A. 24 years; going on 25.

Q. Will you explain to the jury what the duties are of a supervisor of work?

A. I look after maintenance of way places, extra places, work places, work accounts, keep up tracks, remove the trains.

Q. Tell the jury the beginning point and the ending point of the Northern division of the C. and O. as it was in February, 1926?

A. It started at Limeville, Kentucky and ended at Glen Jean in Ohio. That's Waverly, you might say. Over here [fol. 112] on the N. and W.

Q. What was the nature of the traffic carried on over that railroad?

A. Exclusively freight; mostly coal.

Q. Did you see the trains as they would go by?

A. Yes, sir.

Q. Saw them daily?

A. Yes, sir.

Q. Can you give the jury an estimate of about the proportionate tonnage of the coal that went over as compared with the balance of the traffic?

A. I would say at that time it was 85 to 90% coal.

Q. Where did that coal originate?

A. West Virginia and Kentucky.

Q. And where would that coal go to?

A. Most of it went to what you call the lake trade—Toledo docks.

Q. And at Glen Jean to what carrier was the coal carried?

A. N. and W., and at Columbus it was turned over to the Hocking Valley; most of it.

Q. Was there any local delivery of freight by the Northern division of the C. and O. in the State of Ohio?

A. Nothing only car load lots that was sent for by through freight.

Q. How many stops were there between the Ohio River and Glen Jean where the car load lots for local destination were set off?

[fol. 113] A. There were 3. There were only 2. One was a privately owned station that this man handles this stuff himself. That was Suntown, Sundale or Minford. At regular places this stuff was set off.

Q. What was the mileage from Edgington, Kentucky to Glen Jean?

A. About 32; from Limeville, about 30.

Q. And what did this freight consist of that was set off at these 2 local stops you told us?

A. Mostly coal. Sometimes be agricultural lime. Mostly coal. Good deal of agricultural lime along with it.

Q. With distinction between intrastate traffic and interstate traffic what was the nature of the traffic hauled over the C. and O., the Northern subdivision, at this time in February, 1926?

A. Do you mean what kind of stuff they were hauling?

Q. Was it intrastate or interstate?

A. Be out of the state, most of it. Wasn't nothing at this time coming from West Virginia. That was Kentucky coal.

Q. Do you know the place where this accident happened?

A. Yes, sir.

Q. And familiar with the track there at that time?

A. Yes, sir.

[fol. 114] Q. What kind of a track would you call that?

A. We called it a loading track when we put it in there.

Q. Explain for what purpose the track was put in and for what purpose it was being used in February, 1926, at the time of this accident?

A. We had about a mile of gumbo mud that the hills had slid in and raised the grade of our main line to such an nage over this grade. The idea was to put shovels in there and cut this slide out and lower the grade so that we could haul their trains. So we were putting this track in to load dirt out of the slide, and mud.

Q. In other words, as I understand it, the slide was being removed for the purpose of repairing the main track?

A. Yes, to lower the grade. We didn't have an idea of anything else. The fact of the matter was, nobody thought we could get a track in there, that it would stand long enough to get a track in there—the slides wouldn't.

Q. Explain what is meant by tonnage train.

A. The amount of coal we hauled in one train, which was, about that time, about 7200 ton.

Q. Then, as I understand it, the railroad was designed to carry 7200 ton to a train, and this slide had so changed the grade in the track at that point that 7200 ton trains [fol. 115] could not be hauled over the main line there?

A. Not hauled over with full speed; and lots of times we would hang up on this hill. You see the track would raise and stop the train. They couldn't get over the hill.

Q. The removal of this earth for which this track had been put in was for what purpose?

A. Lowering the grade so we could haul these tonnage trains.

Q. Would the removal of that earth have anything to do with respect to the pressure that was exercised by this slide on the main line?

A. It did before we took it out. The hills were coming together and heaving this main line up in the center.

Q. And then you removed this earth? Removed this earth and that released the pressure so the main line would not heave up?

A. Yes, at that time.

Q. What is the rule and custom on the C. and O. and what was it in February, 1926 with respect to section men wearing goggles while cutting rails?

A. Customary that everybody cutting rails to wear goggles. That included 2 strikers and 1 to hold the chisel.

Q. In other words, if one man was holding the chisel where the rail was being cut, he would wear goggles?

A. Yes, sir.

[fol. 116] Q. And if there was one striker, he would wear goggles?

A. Yes, sir.

Q. Both wear goggles?

A. Yes, sir.

Q. Would that mean two pair of goggles or three?

A. That would mean three pair of goggles.

Q. If there were more strikers than two, would additional goggles be provided for the extra men?

A. If there were more, but I don't know of any more. Anybody else around there wouldn't have any business around there while they were not striking.

Q. What was the habit and custom of the section men when there was but one maul in use and it was necessary for the striker to relieve another striker with respect to changing the maul and goggles?

A. The man that was striking turned his goggles over to the man that was going to strike.

Q. Then, the man who had not been striking would not——

A. If he stood around when he was supposed to have it——

Q. If they had one maul to be used in striking how many goggles would they have?

A. If they had one maul to be used in striking?

Q. Yes.

[fol. 117] A. Customary for 2.

Q. 2 pair of goggles?

A. Yes, sir.

Q. Who would wear those goggles?

A. The man striking and the man holding the chisel. The cold cut, we call it.

Q. One maul and one chisel would take 2 pair of goggles? 2 maul and one chisel would take 3 pair of goggles?

A. Yes, sir.

Q. And if more than one man was striking then those who were not engaged would go away?

A. Go away. Not supposed to be around there.

Q. What is the weight of one of these mauls used?

A. We use 2 different types of hammers. Sometimes the section man— It all depends on what one the section man wants to use. Sometimes he uses a sledge hammer, 8 to 10 pounds. It all depends on what the man striking can use—would use. 2 types of maul. Nothing over 10. Nothing under 8. 2 types of weight.

Q. Explain to the jury how a man is obliged to use a maul. I want to know whether he must use it deliberately or hurriedly or the manner of use of the maul.

A. He is supposed to take his time, take it slow, separate strokes, not to rush and sling the hammer over his [fol. 118] shoulders. He is supposed to get up and strike squarely, giving the man with the chisel time to set his chisel. It all depends on how fast the man sets the chisel.

Q. Is it possible to do that work with an 8 or 10 pound sledge with hurried strokes?

A. No. One man wouldn't last long. He wouldn't hit many licks until he would be played out. He'd have to hand it over to somebody else.

Q. What about the man with the chisel—would he keep the chisel just right?

A. Without——

Q. I mean having his chisel right in the cut?

A. Oh, yes, he's got to have it in the cut all the time. You can't set it out to one side. You have to have your chisel in that cut, perpendicularly, before the fellow strikes, you got to have the chisel setting square, and he's got to give it a square lick on the head.

Q. The chisel must be set perpendicularly on the cutting part of the chisel, down into the cut of the rail?

A. Yes, sir.

Q. And he must make those adjustments between blows?

A. Yes, sir.

Q. And that calls for deliberation in striking with the hammer?

[fol. 119] A. Yes, sir.

Q. Does the work necessary to be done by the man with the chisel as just outlined call for deliberation?

A. Yes, sir.

Q. On the part of the man using the maul?

A. Yes, sir.

Cross-examination.

By Mr. Nye:

Q. Where were you, Mr. Rosemire, the morning that Mr. Kuhn got his eye hurt?

A. I don't recall, but I was somewheres on the line east of there.

Q. You were not there?

A. I was not there.

Q. You don't know whether the foreman told him to set up close around?

A. I don't know a thing about the accident.

Q. That all along there was double track, wasn't it?

A. Not then it wasn't.

Q. When was it double track?

A. 1927.

Q. 1927?

[fol. 120] A. Yes, sir. Part of it they were using. If I remember right in November, 1927, they put that double track thru there.

Q. It took about 2 years?

A. Yes, sir. It took about 3 years to get that slide out of there.

Q. And make a double track all the way thru?

A. No. Had the spur at the time to get the slide out. Had to get that out.

Q. And you never saw any freight train go over that spur, did you?

A. No, sir.

Q. Never anything hauled over it but dirt?

A. Dirt. That's all.

Q. How long would it take to set a chisel in a niche in a rail that had been made, to adjust the chisel in the niche in the rail?

A. That would be pretty hard to tell.

Q. Matter of a second?

A. 5 seconds.

Q. Take this long, would it?

A. No, it would take longer than that if he done it right. He couldn't do it in that short a time.

Q. You say it would take at least 5 seconds?

A. Take every bit of that. Man setting a chisel, he's got to take his time and set it right and have it so when the man hits.

Q. He holds it by the handle?

A. Yes. That makes it that much harder to set in there.

[fol. 121] Q. What takes so long?

A. You try it once. You take a chisel with a handle and begin and cut, and it's not over I would say an eighth of an inch wide when you start, just a little crease, and you can't balance the chisel as quick as you want to.

Q. If it was ⅛ it wouldn't be so hard?

A. No, not when you get half way thru it's different. It don't take so long then to set the chisel in there. It's pretty small when you first start and cut thru the rail, an inch or so. If a man starts to swing in a hurry he may miss it. Lots of them do miss it any way.

Q. Who did that steam shovel belong to?

A. It belonged to a contracting firm by the name of Langhorne and Company.

Q. That was the contractor?

A. No, it was not a contractor. It was what you call a force account job paid by the maintenance budget.

Q. Who paid the shovel runner?

A. The C. and O. We did.

Q. You first paid the money to the company who would then charge a per cent, isn't that true?

A. Yes, there is a per cent that came from the force account. They rent their machinery. They pay a per cent on the labor, I think.

Q. Where was Grayley?

[fol. 122] A. He is the man, understand, and Langhorne, they have men that are in with them. They send him out with that and I kind of superintend.

Q. The C. and O. was directing?

A. Langhorne and Company.

Q. You didn't own it?

A. No. Langhorne.

Q. The same company owned the work cars?

A. Yes, we rented them. Paid rent for them $5.00 a day. $10.00 to $15.00 for the spreader, and I think $35.00 a day for the shovel.

Q. Well, then, Langhorne really had the work and you paid them so much?

A. It's work where a bunch of men come in and does the whole job for so much. That's — you call a force account job.

Q. So far as you know all equipment belonged to Langhorne?

A. Except the engine and the caboose. That was the C. and O.'s.

Redirect examination.

By Mr. Bannon:

Q. The work train then, if I understand correctly, that was operated over this spur track, was the C. and O. train?

[fol. 123] A. Yes, sir, the C. and O. crew.

Q. C. and O. crew?

A. Yes, sir.

Q. Was this work construction?

A. Maintenance of way. It's a maintenance of way charge.

Q. The railroad has different accounts—construction, operation and maintenance.

By Mr. Nye: I believe that would be a conclusion as to whether it was maintenance and the best way to determine that would be by producing the records between that Company and Langhorne. So far as him making the statement is concerned, that it's maintenance, that's merely a conclusion. Therefore, we ask that that be stricken out, and also Mr. Moore's little hee haw.

By the Court: If this witness knows how it was carried. Sure enough the records of the railroad would be the best evidence. The motion will be sustained as to the last answer upon the same ground that the best evidence would be the records of the company. The jury will be instructed to disregard the statement of the witness as to how the railroad carried the account.

[fol. 124] By Mr. Bannon:

Q. Mr. Rosemire, do you know how this account is carried, whether construction or maintenance?
A. Yes, sir.
Q. Explain to the jury how you know?
A. Because I know.

Objection.

By the Court: He may explain how he knows.

A. A certain amount of money is put out to us every month that they want to spend in this cut. If is was $18,000 he would have to spend $18,000.00. He couldn't run over or under. If it was $9,000*0*, he dare not run over or under. It was put out by my boss.

Objection.

By the Court: He may testify as to what he knows. If he knows as to how the money was handled.
Exceptions.

A. The division engineer gave us a statement what to spend. It was put out from the maintenance of way division, and how I knew it was a maintenance charge, the maintenance officers' division handled construction work.

Q. What position did you hold with reference to the maintenance work on this line at that time?
[fol. 125] A. I was supervisor of work on the maintenance force. They left it to me to keep this work in shape, to keep the work force going.

Q. What money was allowed for that purpose?

A. Maintenance money. My maintenance money. The money I spent came out of my maintenance allotment.

Q. I then renew my question. Was the work that was being done at the time under maintenance or construction?

A. It was maintenance work. Had to be.

Recross-examination.

By Mr. Nye:

Q. Now, Mr. Rosemire, that is merely the way the railroad handled it. That's the way they wanted it handled?

A. I don't know anything about that.

Q. You are merely an employee? You followed out instructions?

A. Yes, sir.

Q. And whether there was some reason for calling it maintenance instead of construction, you don't know, do you?

A. No.

By Mr. Nye: Then, I move that this whole testimony concerning whether it was maintenance or not be stricken from the record.
[fol. 126] By Mr. Bannon: I can elaborate.

By the Court: The witness has made his ground of knowledge very clear to the jury so we believe the motion will be overruled.

Exceptions.

Q. When did you first know you were to be a witness in this case, Mr. Rosemire?

A. Yesterday.

Q. What time yesterday?

A. About 5:00 o'clock I guess. When I came home from my work.

Q. Who notified you?

A. My wife said, someone called her on the 'phone. The claim agent.

Q. This gentleman here?
A. Yes, sir.
Q. Did you talk to Mr. Bannon about it?
A. No, sir.
Q. You never have talked to him?
A. I have talked to him today.
Q. When was that?
A. About noon. About 20 minutes of 1:00.
Q. Where was that conversation?
A. Over in Mr. Moore's office.
Q. Mr. Moore there too, was he?
A. Yes, sir.
Q. You discussed whether or not it was maintenance or construction, didn't you?
[fol. 127] A. No, sir, we didn't discuss it at all.
Q. What did you *you* discuss?
A. We discussed about this hammer. About the weight of these hammers. About 5 minutes, I guess. When I came out, I came over here.
Q. You never discussed the question as to whether it was maintenance or construction work?
A. No.

And the foregoing was all the evidence offered by the defendant in chief.

The plaintiff offered no evidence in rebuttal and the foregoing was all the evidence, testimony and exhibits offered or introduced by either party upon the trial of this cause.

[fol. 128] DEFENDANT'S MOTION FOR DIRECTED VERDICT

By Mr. Bannon: The defendant at the conclusion of all the evidence offered by both parties moves the Court to direct a verdict in its favor because the evidence does not sustain the charges of negligence stated in the Amended and Supplemental Petition, or either of them; because the evidence establishes that the plaintiff assumed the risk; and because the evidence fails to establish that any negligence of the defendant was the proximate cause of the injury to the plaintiff.

By the Court: The Court is going to hold at this time that on the question of interstate and intrastate commerce under the evidence that undisputed testimony shows that this work was being done on the defendant railway property and was of such a nature that it would fall under the Federal Statute relating to interstate commerce, and we are telling counsel for both sides at this time that the Court's charge will be confined to the law on this proposition before argument so that they will be able to argue their case [fol. 129] accordingly. As to the rest of the Motion made by the defendant or as to all of the Motion made by the defendant, it is overruled.

By Mr. Bannon: And the defendant notes exceptions.

By Mr. Nye: Plaintiff notes his exceptions.

[fol. 130] CHARGE TO JURY

By the Court: Gentlemen of the Jury: Before argument, we wish to read to you what is known as a Special Charge, which involves one proposition of law. You will understand that you will be given the General Charge of the Court which is the law which you will be governed by in your consideration of this case, after the argument. You will consider this charge as a part of that charge when it is given and you will also consider it as the law.

Thereupon the Court read Plaintiff's Special Instruction 1, which is as follows:

"A master owes a duty to his servants to furnish reasonably safe tools and appliances, viz., such as will commend themselves to a reasonably prudent man as reasonably safe and suitable, and such duty is discharged only when the master or its agents whose business it is to supply such instrumentalities exercise due care, as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably safe for use."

[fol. 131] Thereupon said case was argued to the jury by counsel for both parties.

By Mr. Bannon: The arguments having been concluded, the defendant, before the giving of the General Charge to

the jury, requested the Court, in the General Charge, to charge the jury as follows:

"1. I charge you that, as a matter of law, the giving of a peremptory order has not been shown in this case."

Thereupon counsel for plaintiff objected to the giving of said "Defendant's Special Charge No. 1."

Thereupon, the Court refused to give said Defendant's Special Charge No. 1, to which the defendant excepted.

[fol. 132] Thereupon the Court charged the jury as follows:

MEMBERS OF THE JURY: You have heard the evidence in this case that has been offered on behalf of the plaintiff and the evidence that has been offered on behalf of the defendant, and it now becomes the duty of the Court to charge you concerning the law that will govern you in your deliberations in this case.

I do not know how many of you are new to jury duty, and it probably will not be amiss for me at this time to give you a few instructions concerning your duty as jurors before I give the instructions concerning the law that is to govern you in this particular case.

Now the Court, as it is constituted, consists of a judge and jury, and we all have our duty to perform, and it was my duty during the progress of the trial to rule on questions of law, the admissibility of testimony, and, in general, to conduct the progress of the trial.

It is now my duty to charge you as to the law that will govern you during your deliberations, and it is your duty, on the other hand, and I emphasize it as the more important duty, to judge the facts in this case.

You are the sole judges and triers of the facts, and it is for you, and you alone, to determine what the facts in this case are.

[fol. 133] Then it is your duty to follow the law exactly as the Court gives it to you, even though you might think that the law should be otherwise, nevertheless it is your duty as jurors to carefully follow and apply the law as the Court instructs you.

You must determine the facts in this case from the evidence, and the evidence is what the witnesses have been permitted to say to you while on the witness stand, together with the one exhibit, which has been introduced in this case.

Now in this case you have heard the opening statements of the lawyers. That is not evidence. You have heard the arguments of the lawyers, and that is not evidence.

In your jury room, you will have two forms of verdict with you, and that is not evidence. These forms of verdict are submitted to you as a convenience in selecting which one will represent your verdict.

You will have the pleadings with you in your jury room. They are not evidence in the case. They are sent there with you so that you may read them; and we, at this time, will instruct you to read them in order to determine what the issues in this case are, and to refresh your minds concerning the claims made by the different parties in the case, but remember that they are not evidence in this case.

Now, very often in deliberating, jurors become confused as to what the evidence is. After telling you several things [fol. 134] that are not evidence, I wish to repeat to you that the evidence is what the witnesses have been permitted to say to you while on the witness stand, and the exhibit which has been offered in this case. It is from this evidence and from no other source that you must determine the facts in the case and arrive at your verdict.

Just as you are the sole judges of the facts in the case, so you are the sole judges of the credibility of the witnesses and the weight to be given their testimony. In determining the credibility of the witnesses, and the weight to be given their testimony, you should observe the witnesses in this case closely, note their degree of intelligence and their manner of testifying, and their candor or lack of candor, their bias or prejudice, if any, their interest in the outcome of the case, and their means of knowledge of the matters in respect to which they have testified, and you may use those ordinary tests of truthfulness, which you as women and men of ordinary affairs are accustomed to apply in everyday life in determining whether or not the statements of others are worthy of belief.

For good cause, and for good cause only, you may accept as true or untrue either all or any part of the testimony of

any witness. The plaintiff has testified in this case, and his testimony is subject to the same tests which I have pointed out to you concerning the testimony of the witnesses.

The burden is upon the plaintiff in this case to prove his right to recover from the defendant, and this the plaintiff [fol. 135] must do by a preponderance of the evidence.

Preponderance of the evidence simply means the greater weight of the evidence.

The pleadings in this case consist of what is called an amended and supplemental petition, which is the claim of the plaintiff, and the answer to this amended or supplemental petition, which is the claim of the defendant, and the reply to this answer, which is the additional pleading filed by the plaintiff denying certain matters set up in the claim or answer of the defendant. We are not going to read these to you. As we have stated, you will have them with you in your room, and many matters set forth in these pleadings have been admitted in this case, and it is not necessary to enumerate them to you.

There is one matter concerning which we have had considerable testimony, which we will call your attention to, and that was the matter of interstate commerce, and whether or not the particular track being worked on by the plaintiff at the time of the alleged injury was being used in such manner that it could be said to be interstate commerce; that is, whether it is, or was, a proposition of maintenance or construction. You need not consider that matter. The Court has already decided that for you as a matter of law, so that you need not concern yourselves with that at all.

[fol. 136] After the matters admitted in the case are laid aside, we find very few issues. We find that the plaintiff is here claiming that the defendant railroad company was negligent in that it failed to provide the plaintiff with goggles and that it did provice the plaintiff or his fellow worker with a chisel which was in bad condition, and that because of either or both of these matters complained of the plaintiff was injured by having his eye put out, and that the damage claimed therefor is the sum of $30,000.00.

The defendant denies all of that. So that in this case you will first determine whether or not the railroad company failed to furnish the defendant the goggles and did furnish for the cutting of the steel rails in question, or rail, a chisel which was in such bad condition that it should not have

been used. You will determine this matter by the degree of proof which we have called your attention to, and hereafter when we say, "If you find such and such to be the case", we mean by the preponderance of the evidence. You will bear that in mind.

After considering this, you will next look to the proposition of whether or not the failure to do either one or both of these things, if you find that the railroad company did fail on the one hand to furnish the goggles and on the other hand did furnish the unfit tool as alleged in the petition, then you must next determine whether or not that amounts to negligence on the part of the railroad company.

[fol. 137] If you should find that it does not amount to negligence on the part of the railroad company, you need not consider the case further, and you will return a verdict for the defendant, the railroad company.

If you do find by a preponderance of the evidence that it does amount to negligence on the part of the railroad, actionable negligence, which we will define to you, then we will next consider whether or not this negligence was the proximate cause of the injury complained of by the plaintiff.

Negligence is defined as a breach of duty. The railroad company owes a duty to its employees to furnish reasonably safe tools and appliances, that is, such as will commend themselves to a reasonably prudent man, as reasonably safe and suitable, and such duty is discharged only when the master or its agents, that is, the railroad company or its employees whose duty it is to supply such instruments exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably safe for use, and such negligence by the railroad company is essential to recovery in this case.

Absolute safety is unattainable and employers are not insurers. They are liable for the consequences, not of dan-

[fol. 138] ger, but of negligence, and negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances, or doing that which such a person under the existing circumstances would not have done. The essence of the whole matter lies in the omission or commission. The duty is dictated and measured by the circumstances existing at the time.

An employer, which in this case is the railroad company, is not a guarantor of the safety of places of work, or of the

tools used in the work. The extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is being performed and the tools with which the work is being done may be safe for the workmen, and the railroad company, the defendant in this case, is not required to furnish the latest and best tools, or discard standard tools upon the discovery of better tools, provided those in use are reasonably safe and suitable.

Negligence is a fact, and when made the basis of a legal action must be proven as any other fact. Negligence cannot be presumed from the mere fact of the injury. Negligence in a legal sense consists of some act or omission of duty, which we have already stated to you, and it may consist in doing something that ought not to be done, or in not doing something that ought to be done,—both propositions, we will state to you at this time, being in this case.

[fol. 139] Now, by ordinary care is simply meant that degree of care which persons of ordinary care and prudence are accustomed to use under the same or similar circumstances in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others and the objects to be accomplished.

As we have already stated to you, if you find that such negligence does exist, then you must look to the proposition as to whether or not this negligence was the proximate cause of the injury complained of, and it must have been the proximate cause, otherwise there can be no recovery.

By proximate cause is meant a cause from which a person of ordinary experience and sagacity could foresee what results would likely follow; that the injury was of such a character as might reasonably have been expected as the natural and ordinary result of the acts or omissions complained of. It means the cause that directly produces the injury. It is used as a term in contra-distinction to remote cause. It does not necessarily mean the cause nearest in point of time or in point of distance, but does mean that cause without the existence of which the injury would not have been sustained.

If you should find that the defendant, the railroad company, is negligent under the law as we have just given to you, and that such negligence was the proximate cause of

this injury, you cannot yet determine this case, because then you must next look to the proposition which has al- [fol. 140] ready been mentioned to you under the terms of the assumption of risk.

Let us repeat, if you should find by a preponderance of the evidence that the defendant railroad company either neglected to furnish goggles or furnished a tool unfit for use as claimed in the petition, and that either or both of those matters amounts to negligence, and such negligence was the proximate cause of this injury, then next you must consider the matter of assumption of risk.

If you should not find that the negligence is the proximate cause of the injury, that would be the end of the case, and you need go no further, and you should render your verdict for the defendant.

As to the matter of assumption of risk, we wish to give you this rule: by entering and continuing in the service the employee assumes the risks of dangers normally and necessarily incident to the occupation in which he voluntarily engages, and an employee of mature age and years is taken to assume risks of this sort whether he is actually aware of them or not. Even risks arising out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for work are assumed by the employee when the defect and risk are so obvious that an ordinary prudent person under the circumstances would have observed and appreciated them. The true test is not in the exercise of ordi- [fol. 141] nary care to discover dangers by the employee, but whether the defect is known or plainly observable by him, that is, whether the danger which might or might not have been present was known by the employee.

If the employee, that is the plaintiff in this case, was expressly ordered by the foreman, or assistant foreman, whoever it might have been representing the defendant railroad company, to do the work which the plaintiff undertook to do, the fact that it was dangerous would not preclude the plaintiff from recovery, unless the danger was so obvious, and the injury thereby was so inevitable that a man of ordinary prudence would not obey if he was ordered by his employer to do it.

The evidence in this case that is claimed and relied upon by the plaintiff, is that the plaintiff was ordered by the de-

fendant to do this particular work, to rush it, and to stand up close.

It is not disputed in this case that the plaintiff knew that he had no goggles and knew that the chisel in question was battered and burred at the top, so that on that proposition alone the plaintiff would have assumed the risk.

The question which you must consider is whether or not a man of ordinary prudence, if you find that such an order was given as the plaintiff claims, would have obeyed in the manner in which the plaintiff obeyed, and if you should find that a man of ordinary prudence would not have done so, [fol. 142] then you must find for the defendant; but if you find that a man of ordinary prudence would have done so, then you will look further into this case and consider the proposition which is known as contributory negligence.

Contributory negligence is such negligence as may arise from the acts of the plaintiff himself, or his failure to act, which cooperates as a proximate cause in causing the injury complained of, and without which the injury would not have been sustained.

Contributory negligence, if you should find that it does exist in this case shall not bar a recovery by the plaintiff, but the damages shall be diminished by you, if you find the damages exist, in proportion to the amount of negligence attributable to the employee.

We wish to re-state that to you this way, that if you find in this case by a preponderance of the evidence that the casual negligence is attributable partly to the railroad and part-y to the injured employee, that is the plaintiff, then the plaintiff shall not recover full damages but only a diminished sum, bearing the same relation to the full damage that the negligence attributable to both parties,—the purpose being to exclude from the recovery a proportionate part of the damages corresponding to the employee's contribution,—that is the plaintiff's contribution,—to the total negligence.

[fol. 143] At this time we wish to repeat to you on the issues in this case, that if you should find the facts to be that the railroad company failed to furnish goggles and furnished a chisel as described in the petition, then you will next look to the proposition as to whether or not under the law which we have given to you that amounts to negligence, and if you should so find that it does amount to

negligence, then you will next determine whether or not the negligence was the proximate cause of plaintiff's injury. If you do so find that it is the proximate cause of the plaintiff's injury, then next you will look to the proposition of whether or not the plaintiff under the circumstances assumed the risk, if there was a risk, and if you so find under the law as we have defined to you, that the plaintiff did not assume the risk, then you will next look to the proposition of contributory negligence. If your verdict is for the plaintiff, you will consider contributory negligence as it may have a bearing on the amount of damages in the case under the terms as we have defined them to you as being the law.

Now, of course, if you should find that these conditions complained of did not exist, that is the end of the case, and your verdict will be for the defendant, or if you should find that the conditions complained of did not amount to negligence, that is the end of the case, and you need not consider any further, or if you should find that even though it is negligence such negligence is not the proximate cause [fol. 144] of the injury complained of, then your verdict must be for the defendant, or if you should find that plaintiff under the law as we have given it to you did assume the risk, then your verdict must be for the defendant, and you need not consider the case further.

Now in the event you do find for the plaintiff and after considering the proposition of contributory negligence, then you will next consider the measure of damages, and, bearing in mind the instructions which we have given you concerning contributory negligence, we wish to instruct you that the damages shall be in an amount, if you find in favor of the plaintiff, as will fully compensate him for the injuries he has actually sustained directly resulting from the negligence on the part of the defendant, and for not one cent more. This compensation would include the pain he has already suffered, as well as the pain he will continue to suffer, if any, if you are reasonably certain that the injury is of such character as will cause him pain in the future, and the loss that may accrue to him by reason of his diminished capacity to earn money in the future, if you are reasonably certain his injuries are such as to diminish his capacity to earn money in the future. In addition to this he will be entitled to recover, if you find in his favor, for expense, actually incurred, but since there has

been no evidence of expense in this case, you cannot consider that matter, but you might consider expense or outlay in the future, if you find that his injuries are of such char- [fol. 145] acter that they might or would be reasonably incurred by him by reason of the nature of his injuries, if you are reasonably certain they will require expense and outlay on his part in the future. However, in this connection, we wish to make it clear to you that if you should find that contributory negligence existed under the terms as we have given to you, you must apply it exactly under the rules which we have given you, which of course will have a bearing on this instruction concerning the amount of damages which we have just given you.

Now this is a civil action and it will require three-fourths, that is nine or more of your number to agree with each other before you can arrive at a verdict. When nine or more of you have concurred, those concurring will sign the verdict, and you will return it into court.

When you retire to your jury room, select one of your number foreman, who will be in charge during your deliberations. The foreman will sign the verdict if he concurs, and if he does not concur, he will not sign the verdict.

As we have stated, you will have two forms of verdict. If you should find for the plaintiff you will insert the number of jurors so finding. The number so finding will sign the verdict, and you will insert the amount in the space left blank for the amount of damages which you so find. In the event you find for the defendant, you will use the other form of verdict, making a general finding for the defendant, [fol. 146] there being no amount left or blank left for the amount, and those concurring will sign that verdict.

You should conduct your deliberations in an orderly manner. In cases of this kind some of the insructions of the Court may be uninteresting to some jurors. That is the reason why at the outset we try to acquaint you fully with your duties, one of them being in arriving at a verdict to follow the instructions of the court exactly as they have been given to you. In conducting your deliberations you will bear your duties in mind, and it is your duty to be orderly in conducting your deliberations. You will give each juror an opportunity to express himself and his conclusion, and his reasons for those conclusions. You are not to be influenced in any way in this case by any passion,

prejudice or sympathy, but you are to find the facts from the evidence as we have defined it to you under the rules of law which we have given you.

(Addressing counsel:) Has either party at this time any particular point of law in mind on which they wish the Court to charge?

By Mr. Bannon: On behalf of the defendant, note general exceptions to the Charge of the Court, and note an exception to the rule given with respect to the measure of damages, and note an exception to the charge given upon the subject of express orders and comments by the defendant, and note an exception to the failure of the Court to [fol. 147] make clear to the jury that with respect to the goggles the defendant admitted that goggles were not furnished, but contended that it was not the duty of the defendant to furnish the plaintiff with goggles under the circumstances in which the plaintiff was at the time of the injury, and that the issue with respect to goggles was whether under such circumstances the defendant owed a duty to the plaintiff to furnish them.

By Mr. Nye: Note general exceptions to the Charge of the Court.

[fol. 148] VERDICT

Thereupon, and after said charge of the Court, the Jury retired to their room in charge of the bailiff for deliberation and consideration and later returned into court with a verdict in favor of the plaintiff in the sum of $6,000.00.

MOTION FOR NEW TRIAL

Thereupon, and within three days after the rendition of said verdict, to wit, on the 29th day of Nov., 1929 came the defendant and filed its motion for a new trial herein.

On consideration whereof, the Court being fully advised in the premises, overruled said motion for a new trial herein on the 20th day of March 1930, to which defendant excepted, and its exceptions are here noted of record.

And now comes the defendant and presents to the Clerk of the Court of Common Pleas of Pike County, Ohio, within

forty days from the date of the overruling of said motion for a new trial herein this Bill of Exceptions taken by it in said cause.

ORDER SETTLING BILL OF EXCEPTIONS

And on the 31st day of March, 1930, this Bill of Exceptions was received by the undersigned for allowance and signing.

Upon examination the Court finds that said Bill of Exceptions is true and correct in all particulars and contains all of the testimony, evidence and exhibits offered or in- [fol. 149] troduced during the trial of said cause by either party, signs, settles and allows this Bill of Exceptions and the same is ordered to be made a part of the record in this but not spread at large upon the Journal, this 31st day of March, 1930.

Russell K. McCurdy, Trial Judge.

[fol. 150] Clerk's certificate to foregoing transcript omitted in printing.

Judges' certificates to clerk omitted in printing.

[fols. 151 & 152] Clerk's certificate to judges omitted in printing.

[fol. 153] IN SUPREME COURT OF OHIO

No. 22683

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,

v.

WILLIAM KUHN, Defendant in Error

MOTION FOR AN ORDER TO CERTIFY RECORD—Filed Dec. 22, 1930

Now comes the Chesapeake and Ohio Railway Company, the plaintiff in error herein, and respectfully moves this

Court for an order requiring the Court of Appeals of Pike County to certify the record in the cause on the docket of said Court of Appeals, wherein this plaintiff in error, The Chesapeake and Ohio Railway Company, was plaintiff in error, and this defendant in error, William Kuhn was defendant in error, on the following grounds appearing in the record, to-wit:

(1) This cause is one of public and great general interest.

(2) Error has probably intervened in said cause. This plaintiff in error further says that the judgment od said Court of Appeals in this cause was rendered on December 18, 1930.

Levi B. Moore, Henry Bannon, Attorney- for Plaintiff in Error.

Service of the filing of the above motion by receipt of a copy thereof is hereby acknowledged this 18th day of December, 1930.

Earl D. Parker, Attorney for Defendant in Error.

[fol. 154] IN SUPREME COURT OF OHIO

Title

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

vs.

WILLIAM KUHN

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

Action: Motion for an Order Directing the Court of Appeals of Pike County to Certify Its Record

Attorneys: For plaintiff in error, Levi B. Moore, Waverly Ohio; Henry Bannon, Portsmouth, Ohio; for defendant in error, Earl D. Parker, Morgantown, Ohio.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders, and Decrees

1930.

December 22. Motion for an order to certify record, notice and proof of service filed.

December 29. Pl'ff's printed briefs on motion filed, 12-29-30, affidavit of service filed, 1-3-31 P. S. filed.

1931.

January 19. Def't's brief opposing motion filed.

20. Pl'ff's reply brief filed.

28. Motion for an order directing the Court of Appeals of Pike County to certify its record overruled. J. 32-312.

February 4. Certified copy of entry sent Clerk.

* * * * * * *

Journal Entry (J. 32, p. 312)

January 28, 1931. It is ordered by the Court that this motion be, and the same hereby is, overruled.

[fol. 155] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 34

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

vs.

WILLIAM KUHN

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 35

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

vs.

WILLIAM KUHN

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the Court of Appeals of Pike County, State of Ohio, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.
FILED
MAR 14 1931
CHARLES ELMORE CROP
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

34 + 35

Nos. [redacted] and [redacted]

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

WILLIAM KUHN, RESPONDENT.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND TO THE COURT OF APPEALS OF PIKE COUNTY, STATE OF OHIO.

DAVID H. LEAKE,
HENRY BANNON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

Nos. 797 and 798

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

WILLIAM KUHN, RESPONDENT.

PETITION FOR WRITS OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioner, The Chesapeake and Ohio Railway Company, respectfully shows unto this Honorable Court that it is aggrieved by a final judgment entered by the Supreme Court of Ohio, the highest court of the State in which a decision could be had, on the 28th day of January, 1931 (R., 93), against petitioner and in favor of William Kuhn, respondent (sometimes hereinafter called plaintiff), for $6,000.00, with interest and costs.

The case is governed by the Federal Employers'

Liability Act (R., 19). Pederson *v.* Delaware, etc., R. Co., 229 U. S. 146.

Summary Statement of the Matter Involved.

This was an action commenced by respondent in the Common Pleas Court of Pike County, Ohio, against petitioner to recover damages for the loss of the sight of an eye during the course of the employment of respondent by petitioner. In his petition, respondent charged petitioner with negligence in failing to provide goggles for his use and negligence in providing a defective hammer and chisel for use in cutting a steel rail (R., 1). Petitioner denied the negligence charged and denied that respondent was engaged in using either a chisel or hammer or was cutting a rail when he received his injury. Petitioner also pleaded that respondent assumed the risk, and that the cause of action was governed by the Federal Employers' Liability Act (R., 3, 4). Verdict and judgment for respondent were reversed by the Court of Appeals (R., 8) because the Common Pleas should have directed a verdict for the defendant.

After remand, respondent filed an amended and supplemental petition in which he charged petitioner with the same negligence as in the petition and in addition that the foreman of petitioner commanded and ordered respondent to complete his work without the use of goggles for his eyes; and that, pursuant to such command, respondent proceeded with his work and was injured (R., 8, 9). Petitioner pleaded as in the first instance with the addition of a plea of contributory

negligence. A motion of petitioner for a directed verdict, entered at the close of the testimony, was overruled (R. 79-80). There was a verdict and judgment for the respondent. Petitioner moved to vacate the verdict and for a new trial, which was overruled (R. 6). The judgment was affirmed by the Court of Appeals of Pike County Ohio (R., 13, 15, 16).

Petitioner filed a motion in the Supreme Court of Ohio to certify the record in said cause to said Supreme Court for review, which motion was denied (R., 91, 93).

A duly certified copy of the record, including all proceedings in the Common Pleas Court, Court of Appeals, and Supreme Court, is filed herewith.

Statement of Facts.

The facts are not in dispute and, in so far as material, were as follows:

Petitioner and a force of men were repairing the track and roadbed of a railroad engaged exclusively in interstate commerce (R., 80) and respondent was a member of the force. One of the men held a chisel upon a rail while another struck it with a hammer for the purpose of cutting the rail. Respondent was not engaged in doing either work, but was awaiting his turn to use the hammer, such portion of the work being done in relays. While thus standing by, a chip of steel struck his eye. The chip came either from the chisel or the rail, probably from the rail, because bits of steel were being cut from it in order to break it. Respondent was not supplied with goggles, nor was any member

of the crew. It was customary to use goggles (R., 23) and, if one hammer and one chisel were used, two pairs of goggles should have been furnished, one for the man holding the chisel and one for the man wielding the hammer (R., 72-73). There was one hammer and three or more men used it in rotation (R., 22). Respondent was not next in line to use the hammer (R., 28).

The trial court, in the charge to the jury, said:

> "It is not disputed in this case that the plaintiff knew that he had no goggles and knew that the chisel in question was battered and burred at the top, so that on that proposition alone the plaintiff would have assumed the risk" (R., 87).

Such the evidence sustains. Respondent also admitted familiarity with cutting steel rails; that he knew chips were apt to fly from them regardless of whether the tools employed were defective or perfect (R., 29-30). Such risk, he contended, was transferred from him to petitioner because he was commanded to complete his work without the use of goggles and, pursuant to such command, did so and was injured. No evidence was offered to that effect. The facts were thus summed up by the Ohio Court of Appeals:

> "The evidence discloses that several men were working in the section gang; that while one man held the chisel each of the other men took his turn at striking it with the hammer, and that while plaintiff was waiting his turn to use the hammer he received the injury complained of. The men were in charge of a foreman, and there

> is some evidence tending to show that the foreman in charge was positive and dictatorial in his manner and, as one witness said, 'The men were kind of raw hided there that morning'. The track was out of repair and the cars had been jumping the track and the foreman was in a great hurry to repair the same. It was necessary to cut two steel rails and place them in the track. There is some evidence that the foreman commanded the men 'To gang up around here and don't be afraid', and also that he commanded them to 'Gang up and go in a hurry, that he wanted to get thru here'. The plaintiff testified that he was the next man in line to use the hammer and that the foreman said 'Step up close. Be ready to relieve the man that is hammering'. It was while waiting his turn to use the hammer that the plaintiff was struck in the eye by a splinter of steel'' (R., 18).

The testimony attributed to respondent, quoted by the court, was not given by him. It appears in the testimony of another (R., 63). Respondent testified that he could not recall any special words, but that the workmen were called up there to do the work. Upon his memory being refreshed he stated that the foreman told him to ''gang up and go in a hurry; that he wanted to get through there'', and that it seemed to be a hurry-up job. Later he testified that instructions were given by the foreman to keep in line; and upon redirect examination he reiterated that each of the foremen told the men to ''gang around there and do this work'' (R., 21, 22, 23).

Reasons Relied on for Allowance of the Writs.

The law applied by the State courts is in conflict with that applied by Federal courts in causes arising under the Federal Employers' Liability Act in the following particulars:

1. The Ohio Court of Appeals reversed the judgment awarded upon the first trial for the failure to direct a verdict and other errors as to matters of law (R., 8) and granted a new trial. When the cause came before the Ohio Court of Appeals for review the second time, the court said:

> "This is the second time this case has been in this court for review. In the first proceeding in error this court reversed the judgment of the Court of Common Pleas on the ground that the verdict of the jury in favor of the plaintiff was against the manifest weight of the evidence. This court cannot reverse the judgment of the Court of Common Pleas a second time on that ground" (R. 18).

The court further held that there was "some evidence" tending to prove that the plaintiff might have "yielded his own judgment to that of the foreman", and that plaintiff acted under a so-called "peremptory order" and so did not assume the risk.

The ruling of the court in the quoted language is based on Section 11577 of the Ohio General Code, reading as follows:

> "The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case, nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case." Railway *v.* Trendel, 101 Oh. S. 316; Rolf *v.* Heil, 113 Oh. S. 113.

Neither a State statute nor rule of procedure can defeat the principle that a recovery under the Federal Act must be based on substantial evidence.

2. Under the applicable principles of common law, as established and applied in the Federal courts, respondent assumed the risk of injury from the defective chisel and the failure to supply goggles for protection to his eyes; the theory of a so-called "peremptory order" is not admissible; respondent is not entitled to recover, as a matter of law, and a verdict should have been directed for petitioner.

3. The Ohio Court of Appeals seems to have admitted that its decision may not have been in conformity with the decisions of the Federal courts. It said (R., 19):

> "It has been suggested that we should look to the Federal Courts for interpretation of questions arising under the Federal Employers' Liability Act. This is the general rule but where our Supreme Court has passed upon a question, as it has this one, it is our duty to follow the

decision of our Supreme Court rather than the decision of a court of some other jurisdiction."

The decisions of this Honorable Court and other Federal courts on the questions involved are authoritative and controlling, and the decisions of the Ohio courts are believed to be in conflict therewith.

The Supreme Court of Ohio and the Court of Appeals of Pike County, Ohio, erred as a matter of law:

In affirming the ruling of the Court of Common Pleas of Pike County, Ohio, in overruling petitioner's motion to direct the jury to return a verdict in its favor (R., 80), in overruling petitioner's motion to vacate the verdict and award a new trial (R., 6), and in not reversing the judgment of said Court of Common Pleas.

Prayer.

WHEREFORE petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Honorable Court, direct to the Supreme Court of Ohio and to the Court of Appeals of Pike County, Ohio, commanding those courts to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case of The Chesapeake and Ohio Railway Company, plaintiff in error, *vs.* William Kuhn, defendant in error, and that the judgments of the Supreme Court of Ohio and of the Court of Appeals of Pike County, Ohio, may be

reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
By DAVID H. LEAKE,
HENRY BANNON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

(1.)

The Opinion of the Court Below.

The opinion of the Ohio Court of Appeals in this case appears at page 17 of the record. No opinion was filed by the Supreme Court of Ohio.

The case is not officially reported.

(2.)

Jurisdiction.

Jurisdiction by certiorari is conferred upon this Court by Judicial Code, Sec. 237 (*b*), as amended by the Act of February 13, 1925, 43 Stat. 937.

The date of the judgment to be reviewed is, Supreme Court of Ohio, January 28, 1931; Ohio Court of Appeals, December 18, 1930.

This action is based on a law of the United States, Federal Employers' Liability Act (35 Stat. 65, ch. 149; 36 Stat., ch. 143), and the court has decided Federal questions of substance, involving matters of law, it is believed, erroneously.

The following cases, selected from a great number, support the jurisdiction.

Atchison, etc., R. Co. *v.* Toops, 281 U. S. 351;

New York, etc., R. Co. *v.* Ambrose, 280 U. S. 486;

Chesapeake, etc., R. Co. *v.* Mihas, 280 U. S. 102;

Pryor *v.* Williams, 254 U. S. 43.

(3.)

Statement of the Case.

A full statement of the case is made in the petition.

(4.)

Summary of Argument.

The assignment of error will be discussed under the following points:

Point I. Neither a state statute nor a state rule of procedure may be invoked by a State court to support a recovery in cases arising under the Federal Employers' Liability Act unless there is substantial evidence to support the judgment.

Point II. Even if there were substantial evidence that the respondent "yielded his own judgment to that of the foreman" (R., 18), under a so-called "peremptory order" the holding of the State courts denying the defense of assumed risk is contrary to the rules of law established by the decisions of Federal courts.

Point III. There is no substantial evidence to support a finding that the respondent acted under any compulsion or that the foreman gave him any "peremptory order" and consequently the judgment cannot be sustained on that ground.

ARGUMENT.

POINT I. Neither a State statute nor a State rule of procedure may be invoked by a State court to support a recovery in cases arising under the Federal Employers' Liability Act unless there is substantial evidence to support the judgment.

Upon the second review of the case the Court of Appeals held that it was precluded from considering whether the verdict was against the "manifest weight" of the evidence and upheld the judgment on the ground that there was "some evidence" to sustain the theory of a "peremptory order", which, it held, denied the defense of assumed risk.

Neither the scintilla rule—which seems in substance to be what was applied—nor the State statute which has been referred to (Sec. 11577 of the Ohio General Code) have any potency in cases controlled by the Federal Employers' Liability Act. If the testimony and all the inferences which the jury may reasonably draw therefrom are insufficient to support the finding of the jury there can be no recovery.

New Orleans, etc., R. Co. *v.* Harris, 247 U. S. 367;

Western Atlantic R. Co. *v.* Hughes, 278 U. S. 496;

Compare Central Vermont R. Co. *v.* White, 238 U. S. 507.

POINT II. Even if there were substantial evidence that the respondent "yielded his own judgment to that of the foreman" (R., 18), under a so-called "peremptory order," the holding of the State courts denying the defense of assumed risk is contrary to the rules of law established by the decisions of Federal courts.

The applicable rule, applied by this Court, as to the assumption of risk by a servant of danger from a defective appliance, in cases under the Federal Employers' Liability Act, is that—

> "* * * a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him".
>
> Boldt *v.* Penn. R. Co., 245 U. S. 441, 445.

In such a case it has been said:

> "When the employe does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe assumes the risk, even though it arises out of the master's breach of duty".
>
> Seaboard, etc., R. Co. *v.* Horton, 233 U. S. 492, 504.

And when obvious or fully known and appreciated the employee likewise assumes the risk of negligence of his fellow-employees.

Toledo, etc., R. Co. *v.* Allen, 276 U. S. 165, 169;
Boldt *v.* Penn. R. Co., *supra;*
Chesapeake, etc., R. Co. *v.* De Atley, 241 U. S. 310.

In some jurisdictions the fact that the servant, at the time of his injury, was complying with a "direct, specific, personal order" of the master or the master's representative has been held, under some circumstances, to destroy the defense of assumption of risk. See 4 Labatt's Master & Servant (2d ed.), sec. 1357, p. 3913 *et seq.*, where the subject is much discussed.

It is said, however, by Labatt in his discussion (*idem*, sec. 1367, p. 3952):

> "* * * it is clear that the fact of the servant's having acted under a direct order is immaterial, if it is apparent that he fully appreciated the danger which he was required to encounter",

and this is supported by decisions of the Federal courts.

A leading Federal case is that of Union Pacific Co. *v.* Marone (C. C. A., 8th), 246 Fed. 916. There a section hand was assisting in cutting a rail with hammer and chisel. The rules required that goggles be furnished to protect the eyes of workmen. Goggles were in the tool-house when the accident occurred. The plaintiff knew of the danger. He was injured in the manner the plaintiff was injured in this case and the court held that he assumed the risk. The Marone case is stronger for the plaintiff than this case, because Marone asked for protection to his eyes and was told

to 'Go on; that it was all right; that the workmen did not use goggles'. Marone continued because he feared he might lose his job. The opinion is by Judge Sanborn and the brief concurrence of Judge Stone is right to the point.

A recent case is that of Hallstein *v.* Penn. R. Co. (C. C. A., 6th), 30 Fed. (2d) 594 (Ohio, 1929). There the plaintiff was directed to install lights in a coal tipple, so as to facilitate the loading of interstate engines at night.

He objected to doing the work without being supplied with a safety belt, as it was dangerous so to do. He was told that he had his orders that the work had to be done, and "if it is not done you know what it will mean". He started the work and in the course of it was injured. He sued under the Federal Employers' Liability Act, alleging as negligence the failure to furnish the safety belt. On error, the court held that, knowing the danger, he assumed the risk; that the order to do the work after his objection was not an assurance of safety and the threat of discharge did not affect his assumption of the risk.

The court said (Judge Hickenlooper):

> "The doctrine of assumption of risk is ordinarily considered as resting upon the maxim '*volenti non fit injuria,*' or upon the contract of employment. Chicago, B. & Q. Co. *v.* Shalstrom, 195 Fed. 725, 729 (C. C. A., 8), 45 L. R. A. (N. S.) 387. And either basis of origin would support application of the doctrine in case of dangers fully known and appreciated, whether the employment is continued with or without complaint. Accordingly, the fact that complaint

was made and remedy refused under threat of discharge has been held insufficient alone to relieve the servant from assumption of risk. Washington Terminal Co. *v.* Sampson, 53 App. D. C. 179, 289 F. 577; Union Pac. R. Co. *v.* Marone, 246 F. 916 (C. C. A., 8) Cf. Hogan *v.* B. & O. R. Co., 15 F. (2d) 739 (C. C. A., 6), in which demand for a proper tool was made, and D., L. & W. R. Co. *v.* Tomasco, 256 Fed. 14 (C. C. A., 2), in which demand for a light was made and refused. The case of C., N. O. & T. P. R. Co. *v.* Thompson, 236 F., 1 (C. C. A., 6), in which Judge Cochran speaking for the court, exhaustively considers the authorities, must be construed as deciding that the danger was not known and appreciated by the employee, for when so known and appreciated this court has consistently held that the risk is assumed. N. Y. C. & St. L. R. Co. *v.* McDougall, 15 F. (2d), 283 (C. C. A., 6). Compare, also, Pryor, Receiver, *v.* Williams, 254 U. S. 43, 41 S. Ct., 36, 65 L. Ed., 120."

The Ohio rule, as shown by the decision here, is in direct conflict and in cases like those just cited apply the principle of a "peremptory order" given a servant by one in authority over him. A leading case in Ohio is that of Railroad *v.* Malsek, 118 Oh. S. 644, (1928). The opinion is so brief it may be given substantially in full:

> "A majority of the court are of opinion that the matter is controlled by the principle of the cases where the master, or one in authority over the servant, peremptorily orders him to do a particular work, apparently dangerous, yet such

> as a reasonably prudent person, acting under the influence or restraint of such an order, might in obedience thereto properly undertake to perform. The question whether a man of ordinary care and prudence, under such circumstances, would have proceeded with the work is one of fact for the jury, under proper instructions from the trial court."

In order to get the facts of Malsek's case one must go to the record filed with the Ohio Supreme Court.

Malsek was chipping holes in a plant with an adz. The tool became dull and nicked from usage and caused chips to fly in such manner as to endanger him. So he took the adz to the foreman, told him it was worthless, and requested that he be furnished with another adz. Being told there was no other adz, Malsek asked that his adz be sharpened. This was refused with the command: "Take this adz; you go to work with this adz." Malsek said he would do so after goggles were furnished to him. The foreman replied that he wanted to finish the job and that if Malsek didn't want to continue with the adz, "I am going to fire you, you go home". Malsek said he was scared for his job, went to work, struck a lick, and a piece from the plank struck him in the eye.

Tuck *v.* Chapple, 115 Oh. S. 177, is remotely similar upon the facts, but the only point involved in that case is the application of a State statute concerning "obedience to the immediate or peremptory instructions or orders given by the employer."

POINT III. There is no substantial evidence to support a finding that the respondent acted under any compulsion or that the foreman gave him any "peremptory order," and consequently the judgment cannot be sustained on that ground.

Respondent made no complaint of the defective condition of the chisel—of which he was fully aware (R., 24)—and made no demand for goggles, although he knew of the danger to be apprehended from flying chips of steel (R., 29). No command was given him to work without goggles or to work with the chisel alleged to be defective. Nor was he threatened with discharge.

There was no direct, specific or personal order given him at any time in connection with the use of the chisel or as to the non-use of goggles.

Respondent could not recall anything out of the ordinary until his recollection was refreshed (R., 22), and then all he could recall, in this regard, was that the foreman told him "to gang up and go in a hurry; that he wanted to get through" (R., 22).

There is not even a scintilla of evidence to support the theory advanced by the appellate court that respondent acted under any compulsion other than that incident to every employment wherein the servant is subject to the general orders of a superior.

The evidence does not even remotely tend to support the finding and, therefore, the judgment of such court cannot be supported on the ground upon which it was based—a ground believed to be erroneous to start with.

Conclusion.

The Ohio courts, in giving effect to the Ohio statute which has been referred to (sec. 11577, Ohio General Code), greatly hamper the defense in cases brought in the courts of that State under the Federal Act, and it is a matter of great public importance that the limitations of the Ohio courts in this respect be pointed out by this Honorable Court.

Furthermore, if the Ohio rule as to a "peremptory order" continues to be enforced in the Ohio courts in the trial of cases like this, arising under the Act, then in all such cases the defense of assumed risk is defeated if the employee be acting within the scope of his employment and under the general direction of his employer.

It is, with great respect, submitted that the judgments of the Supreme Court of Ohio and of the Court of Appeals for Pike County, Ohio, are erroneous, and that they should be reviewed and reversed.

DAVID H. LEAKE,
HENRY BANNON,
Counsel for Petitioner.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

Nos. 34 and 35

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

WILLIAM KUHN, RESPONDENT.

BRIEF FOR PETITIONER.

DAVID H. LEAKE,
HENRY BANNON,
Counsel for Petitioner.

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WILLIAM KUHN, RESPONDENT.

BRIEF FOR PETITIONER.

The Opinion of the Court Below.

The opinion of the Ohio Court of Appeals in this case appears at page 17 of the record. No opinion was filed by the Supreme Court of Ohio.

The case does not appear to be officially reported as yet, but there is a report of it in 9 Ohio Law Abstract, 378, a publication frequently cited by Ohio courts.

Jurisdiction.

Jurisdiction by certiorari is conferred here by Judicial Code, Sec. 237 (*b*), as amended by the Act of

February 13, 1925, 43 Stat. 937; U. S. C. A., Title 28, Ch. 9, Sec. 344 (*b*).

The date of the judgment to be reviewed is Supreme Court of Ohio, January 28, 1931 (R., 93); Ohio Court of Appeals, December 18, 1930 (R., 16-17).

This action is based on the Act of Congress, as amended, known as the Federal Employers' Liability Act (Act of April 22, 1908, 35 Stat. 65; Act of April 5, 1910, 36 Stat. 291; U. S. C. A., Title 45, Ch. 2, Sections 51 to 59, inclusive), and the court has decided, it is believed erroneously, Federal questions of substance, involving matters of law.

The following cases, selected from a great number, support the jurisdiction:

Atchison, etc., R. Co. *v.* Toops, 281 U. S. 351;

New York, etc., R. Co. *v.* Ambrose, 280 U. S. 486;

Chesapeake, etc., R. Co. *v.* Mihas, 280 U. S. 102;

Pryor *v.* Williams, 254 U. S. 43.

Statement of the Case.

Pleadings and Issues.

This was an action commenced by respondent in the Common Pleas Court of Pike County, Ohio, against petitioner to recover damages for the loss of the sight of an eye during the course of the employment of respondent by petitioner. In his petition, respondent charged petitioner with negligence in failing to provide goggles for his use and negligence in providing a defective hammer and chisel for use in cutting a steel rail (R., 1). Petitioner denied the negligence charged

and denied that respondent was engaged in using either a chisel or hammer or was cutting a rail when he received his injury. Petitioner also pleaded that respondent assumed the risk, and that the cause of action was governed by the Federal Employers' Liability Act (R., 3, 4). Verdict and judgment for respondent were reversed by the Court of Appeals (R., 8) because, among other reasons, the Common Pleas Court should have directed a verdict for the defendant.

After remand, respondent filed an amended and supplemental petition in which he charged petitioner with the same negligence as in the petition and in addition that the foreman of petitioner commanded and ordered respondent to complete his work without the use of goggles for his eyes, and that, pursuant to such command, respondent proceeded with his work and was injured (R., 8, 9). Petitioner pleaded as in the first instance, with the addition of a plea of contributory negligence. A motion of petitioner for a directed verdict, entered at the close of the testimony, was overruled (R., 79-80). There was a verdict and judgment for the respondent. Petitioner moved to vacate the verdict and for a new trial, which was overruled (R., 6). The judgment was affirmed by the Court of Appeals of Pike County, Ohio (R., 13, 15, 16). The case went to the jury under the Federal Employers' Liability Act (R., 80). Pederson *v.* Delaware, etc., R. Co., 229 U. S. 146.

Petitioner filed a motion in the Supreme Court of Ohio, the highest court of the State in which a decision can be had, to certify the record in said cause to said Supreme Court for review, which motion was denied

(R., 91, 93). Petitions for writs of certiorari filed in this court were granted.

A duly certified copy of the record, including all proceedings in the Common Pleas Court, Court of Appeals, and Supreme Court, is filed herewith.

Statement of Facts.

The facts are not in dispute, and, in so far as material, were as follows:

Petitioner and a force of men were repairing the track and roadbed (R., 21, 33, 40, 71) of a railroad engaged (exclusively, it appears) in interstate commerce (R., 70) and respondent was a member of the force. One of the men held a chisel upon a rail while another struck it with a hammer for the purpose of cutting the rail. Respondent was not engaged in doing either work, but was awaiting his turn to use the hammer or maul, such portion of the work being done in relays. While thus standing by, a chip of steel struck his eye. The chip came either from the chisel or the rail, probably from the rail, because bits of steel were being cut from it in order to break it. It was customary for the man holding the chisel and the one using the hammer (R., 45), and perhaps others of the workmen, to use goggles (R., 23, 28, 29, 55). These goggles appear to have been kept at the tool-house (R., 55), though, it was stated, there were none "on the job" on this occasion (R., 22, 46, 51). There was one hammer and three or more men used it in rotation (R., 22). Respondent, on his own statement, was not next in line to use the hammer (R., 28).

The trial court, in the charge to the jury, said:

> "It is not disputed in this case that the plaintiff knew that he had no goggles and knew that the chisel in question was battered and burred at the top, so that on that proposition alone the plaintiff would have assumed the risk" (R., 87).

Such the evidence sustains. Respondent also admitted familiarity with cutting steel rails; that he knew chips were apt to fly from them regardless of whether the tools employed were defective or perfect (R., 29-30). Such risk, it was contended, was transferred from him to petitioner because he was commanded to complete his work without the use of goggles and, pursuant to such command, did so and was injured. No evidence was offered to that effect. The facts were thus summed up by the Ohio Court of Appeals:

> "The evidence discloses that several men were working in the section gang; that while one man held the chisel each of the other men took his turn at striking it with the hammer, and that while plaintiff was waiting his turn to use the hammer he received the injury complained of. The men were in charge of a foreman, and there is some evidence tending to show that the foreman in charge was positive and dictatorial in his manner and, as one witness said, 'The men were kind of raw hided there that morning'. The track was out of repair and the cars had been jumping the track and the foreman was in a great hurry to repair the same. It was necessary to cut two steel rails and place them in the track. There is some evidence that the foreman

> commanded the men 'To gang up around here and don't be afraid', and also that he commanded them to "Gang up and go in a hurry, that he wanted to get thru here'. The plaintiff testified that he was the next man in line to use the hammer and that the foreman said 'Step up close. Be ready to relieve the man that is hammering'. It was while waiting his turn to use the hammer that the plaintiff was struck in the eye by a splinter of steel" (R., 18).

The testimony attributed to respondent, quoted by the court, was not given by him. It appears in the testimony of another (R., 63). Respondent testified that he could not recall any special words, but that the workmen were called up there to do the work. Upon his memory being refreshed he stated that the foreman told him to "gang up and go in a hurry; that he wanted to get through there", and that it seemed to be a hurry-up job (R., 22). Later he testified that instructions were given by the foreman to keep in line (R., 23), and upon redirect examination he reiterated that the foreman told the men to "gang around there and do this work. It was a hurry up job" (R., 30). Other witnesses attributed similar expressions to the foreman (R., 42, 45, 46, 51, 55, 62. 63).

Reasons Relied on for Reversal.

The law applied by the State courts is in conflict with that applied by Federal courts in causes arising under the Federal Employers' Liability Act in the following particulars:

1. The Ohio Court of Appeals reversed the judgment awarded upon the first trial for the failure to direct a verdict and other errors as to matters of law (R., 8) and granted a new trial. When the cause came before the Ohio Court of Appeals for review the second time, the court said:

> "This is the second time this case has been in this court for review. In the first proceeding in error this court reversed the judgment of the Court of Common Pleas on the ground that the verdict of the jury in favor of the plaintiff was against the manifest weight of the evidence. This court cannot reverse the judgment of the Court of Common Pleas a second time on that ground" (R., 18).

The court further held that there was "some evidence tending to prove that the plaintiff might have yielded his own judgment to that of the foreman", and that plaintiff acted under a so-called "peremptory order" and so did not assume the risk.

The ruling of the court in the quoted language is based on Section 11577 of the Ohio General Code, reading as follows:

> "The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case, nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case." Cleveland Railway Co. *v.* Trendel, 101 Oh. S. 316; Rolf *v.* Heil, 113 Oh. S. 113.

Neither a State statute nor rule of procedure can defeat the principle that a recovery under the Federal Act must be based on substantial evidence.

2. Under the applicable principles of common law, as established and applied in the Federal courts, respondent assumed the risk of injury from the defective chisel and the failure to supply goggles for protection to his eyes; the theory of a so-called "peremptory order" is not admissible; respondent is not entitled to recover, as a matter of law, and a verdict should have been directed for petitioner.

3. The Ohio Court of Appeals seems to have admitted that its decision may not have been in conformity with the decisions of the Federal courts. It said (R., 19):

> "It has been suggested that we should look to the Federal courts for interpretation of questions arising under the Federal Employers' Liability Act. This is the general rule but where our Supreme Court has passed upon a question, as it has this one, it is our duty to follow the decision of our Supreme Court rather than the decision of a court of some other jurisdiction."

The decisions of this Honorable Court and other Federal courts on the questions involved are authoritative and controlling, and the decisions of the Ohio courts are believed to be in conflict therewith.

The Supreme Court of Ohio and the Court of Appeals of Pike County, Ohio, erred as a matter of law:

In affirming the ruling of the Court of Common

Pleas of Pike County, Ohio, in overruling petitioner's motion to direct the jury to return a verdict in its favor (R., 80), in overruling petitioner's motion to vacate the verdict and award a new trial (R., 6), and in not reversing the judgment of said Court of Common Pleas.

Summary of Argument.

The assignment of error will be discussed under the following points:

Point I. *Neither a State statute nor a State rule of procedure may be invoked by a State court to support a recovery in cases arising under the Federal Employers' Liability Act unless there is substantial evidence to support the judgment.*

Point II. *Even if there were substantial evidence that the respondent "yielded his own judgment to that of the foreman"* (R., 18), *under a so-called "peremptory order", the holding of the State courts denying the defense of assumed risk is contrary to the rules of law established by the decisions of Federal courts.*

Point III. *There is no substantial evidence to support a finding that the respondent acted under any compulsion or that the foreman gave him any "peremptory order" and consequently the judgment cannot be sustained on that ground.*

ARGUMENT.

Point I. Neither a State statute nor a State rule of procedure may be invoked by a State court to support a recovery in cases arising under the Federal Employers' Liability Act unless there is substantial evidence to support the judgment.

Upon the second review of the case the Court of Appeals held that it was precluded from considering whether the verdict was against the "manifest weight" of the evidence and upheld the judgment on the ground that there was "some evidence" to sustain the theory of a "peremptory order", which, it held, denied the defense of assumed risk.

Neither the scintilla rule—which seems in substance to be what was applied—nor the State statute which has been referred to (Sec. 11577 of the Ohio General Code) have any potency in cases controlled by the Federal Employers' Liability Act. If the testimony and all the inferences which the jury may reasonably draw therefrom are insufficient to support the finding of the jury there can be no recovery.

New Orleans, etc., R. Co. *v.* Harris, 247 U. S. 367;

Western Atlantic R. Co. *v.* Hughes, 278 U. S. 496;

Herron *v.* Southern Pacific Co., No. 131, October Term, 1930;

Compare Central Vermont R. Co. *v.* White, 238 U. S. 507.

Point II. Even if there were substantial evidence that the respondent "yielded his own judgment to that of the foreman" (R. 18), under a so-called "peremptory order," the holding of the State courts denying the defense of assumed risk is contrary to the rules of law established by the decisions of Federal courts.

The applicable rule, applied by this Court, as to the assumption of risk by a servant of danger from a defective appliance, in cases under the Federal Employers' Liability Act, is that—

> "* * * a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him."
>
> Boldt *v.* Penn. R. Co., 245 U. S. 441, 445.

In such a case it has been said:

> "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty."
>
> Seaboard, etc., R. Co. *v.* Horton, 233 U. S. 492, 504.

And when obvious or fully known and appreciated the employee likewise assumes the risk of negligence of his fellow-employees.

> Toledo, etc., R. Co. *v.* Allen, 276 U. S. 165, 169;
> Boldt *v.* Penn. R. Co., *supra;*

Chesapeake, etc., R. Co. *v.* De Atley, 241 U. S. 310.

In some jurisdictions the fact that the servant, at the time of his injury, was complying with a "direct, specific personal order" of the master or the master's representative has been held, under some circumstances, to destroy the defense of assumption of risk. See 4 Labatt's Master & Servant (2d ed.), sec. 1357, p. 3913 *et seq.*, where the subject is much discussed.

It is said, however, by Labatt in his discussion (*idem*, sec. 1367, p. 3952):

> "* * * it is clear that the fact of the servant's having acted under a direct order is immaterial, if it is apparent that he fully appreciated the danger which he was required to encounter,"

and this is supported by decisions of the Federal courts.

A leading Federal case is that of Union Pacific Co. *v.* Marone (C. C. A., 8th), 246 Fed. 916. There a section hand was assisting in cutting a rail with hammer and chisel. The rules required that goggles be furnished to protect the eyes of workmen. Goggles were in the tool-house when the accident occurred. The plaintiff knew of the danger. He was injured in the manner the plaintiff was injured in this case and the court held that he assumed the risk. The Marone case is stronger for the plaintiff than this case, because Marone asked for protection to his eyes and was told to "Go on; that it was all right; that the

workmen did not use goggles." Marone continued because he feared he might lose his job. The opinion is by Judge Sanborn and the brief concurrence of Judge Stone is right to the point.

A recent case is that of Hallstein *v.* Penn. R. Co. (C. C. A., 6th), 30 Fed. (2d) 594 (Ohio, 1929). There the plaintiff was directed to install lights in a coal tipple, so as to facilitate the loading of interstate engines at night.

He objected to doing the work without being supplied with a safety belt, as it was dangerous so to do. He was told that he had his orders, that the work had to be done, and "if it is not done you know what it will mean." He started the work and in the course of it was injured. He sued under the Federal Employers' Liability Act, alleging as negligence the failure to furnish the safety belt. On error, the court held that, knowing the danger, he assumed the risk; that the order to do the work after his objection was not an assurance of safety and the threat of discharge did not affect his assumption of the risk.

The court said (Judge Hickenlooper):

> "The doctrine of assumption of risk is ordinarily considered as resting upon the maxim '*volenti non fit injuria*,' or upon the contract of employment. Chicago, B. & Q. Co. *v.* Shalstrom, 195 Fed. 725, 729 (C. C. A., 8), 45 L. R. A. (N. S.) 387. And either basis of origin would support application of the doctrine in case of dangers fully known and appreciated, whether the employment is continued with or without complaint. Accordingly, the fact that complaint

was made and remedy refused under threat of discharge has been held insufficient alone to relieve the servant from assumption of risk. Washington Terminal Co. *v.* Sampson, 53 App. D. C. 179, 289 F. 577; Union Pac. R. Co. *v.* Marone, 246 F. 916 (C. C. A., 8); C. F. Hogan *v.* B. & O. R. Co., 15 F. (2d) 739 (C. C. A., 6), in which demand for a proper tool was made, and D., L. & W. R. Co. *v.* Tomasco, 256 Fed. 14 (C. C. A., 2), in which demand for a light was made and refused. The case of C., N. O. & T. P. R. Co. *v.* Thompson, 236 F., 1 (C. C. A., 6), in which Judge Cochran, speaking for the court, exhaustively considers the authorities, must be construed as deciding that the danger was not known and appreciated by the employee, for when so known and appreciated this court has consistently held that the risk is assumed. N. Y. C. & St. L. R. Co. *v.* McDougall, 15 F. (2d) 283 (C. C. A., 6). Compare, also, Pryor, Receiver, *v.* Williams, 254 U. S. 43, 41 S. Ct. 36, 65 L. Ed. 120."

See also:

Chicago, etc., R. Co. *v.* Shalstrom (C. C. A., 8th), 195 Fed. 725, 729;

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Musser-Sauntry Land, etc., Co. *v.* Brown (C. C. A., 8th), 126 Fed. 141, 144.

The Ohio rule, as shown by the decision here, is in direct conflict and in cases like those just cited apply

the principle of a "peremptory order" given a servant by one in authority over him. A leading case in Ohio is that of Penn. R. Co. *v.* Malsek, 118 Oh. S. 644 (1928). The opinion is so brief it may be given substantially in full:

> "A majority of the court are of opinion that the matter is controlled by the principle of the cases where the master, or one in authority over the servant, peremptorily orders him to do a particular work, apparently dangerous, yet such as a reasonably prudent person, acting under the influence or restraint of such an order might in obedience thereto properly undertake to perform. The question whether a man of ordinary care and prudence, under such circumstances, would have proceeded with the work is one of fact for the jury, under proper instructions from the trial court."

Malsek was chipping away portions of a cross-tie with an adz. The tool was dull and nicked from usage and caused chips to fly in such manner as to endanger him. He complained to the foreman who told him he had no other adz, whereupon he continued to use it. Malsek then asked for a pair of goggles, and the foreman said he had none there, but that there was a pair at another station. Malsek was ordered to go forward with his work, and did so, and was injured by a chip striking his eye.

The opinion of the Court of Appeals in Malsek's case may be found in 26 Ohio Appellate Reports at page 520. It appears from that opinion that the majority of the Court held that the plaintiff was en-

titled to recover under "the Ohio rule as to peremptory orders." The dissenting member was of opinion that "under the United States law there is a clear assumption of risk." The facts of the case may be gathered from the majority and minority opinions in this report. The Common Pleas Court had directed a verdict for the defendant for the reason that the plaintiff testified that he knew and appreciated the dangers from the use of the adz.

Consideration of this opinion of the Ohio Court of Appeals leads to the conclusion that in Ohio the courts of last resort are not, in cases like the one at bar, applying the principles of common law, as established and applied in the Federal courts.

Tuck *v.* Chapple, 115 Oh. S. 177, is remotely similar upon the facts, but the only point involved in that case is the application of a State statute concerning "obedience to the immediate or peremptory instructions or orders given by the employer."

Point III. There is no substantial evidence to support a finding that the respondent acted under any compulsion or that the foreman gave him any "peremptory order," and consequently the judgment cannot be sustained on that ground.

Respondent made no complaint of the defective condition of the chisel—of which he was fully aware (R., 24)—and made no demand for goggles, although he knew of the danger to be apprehended from flying chips of steel (R., 29). No command was given him to work without goggles or to work with the chisel al-

leged to be defective. Nor was he threatened with discharge.

There was no direct, specific or personal order given him at any time in connection with the use of the chisel or as to the non-use of goggles.

Respondent could not recall anything out of the ordinary until his recollection was refreshed (R., 22), and then all he could recall, in this regard, was that the foreman told him "to gang up and go in a hurry; that he wanted to get through" (R., 22).

There is not even a scintilla of evidence to support the theory advanced by the appellate court that respondent acted under any compulsion other than that incident to every employment wherein the servant is subject to the general orders of a superior.

The evidence does not even remotely tend to support the finding and, therefore, the judgment of such court cannot be supported on the ground upon which it was based—a ground believed to be erroneous to start with.

It is, with great respect, submitted that the judgments of the Supreme Court of Ohio and of the Court of Appeals for Pike County, Ohio, are erroneous, and that they should be reversed.

DAVID H. LEAKE,
HENRY BANNON,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

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WILLIAM KUHN,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRITS OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Nos. 797 and 798.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM KUHN,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRITS OF CERTIORARI.

May It Please the Court:

STATEMENT OF FACTS.

At the time of the injury as alleged in the respondent's amended and supplemental petition, which occurred in February, 1926, respondent was employed on a section gang on The Chesapeake & Ohio Railway Company, the

petitioner in this case. On the morning of the injury the extra gang, of which respondent was a member, started out upon their regular duties in maintaining the right of way, and within an hour or so later one of the petitioner's agents, foreman Sturgell, came to the foreman then in charge of the gang in which respondent was employed and stated that they were having trouble with a spur track used by dump cars and an egine in hauling dirt to a waste dump. Mr. Sturgell, the foreman, was in a hurry because the dump cars had been jumping the track and it was necessary to cut two steel rails and place them in the track on this spur so that the dirt could be moved from a slide that had occurred on the main track.

Without exercising the customary precaution by providing the workmen with goggles, which were in the tool house some distance away, the foreman ordered the men to gang up around the steel rails and cut them to the required length.

The procedure in cutting the rails as used this particular day was for the men to stand in a half circle around another workman who held the chisel and be ready to relieve the man wielding the heavy sledge upon the chisel. This was very strenuous work and required several men to be in readiness for relief with the hammer. Just before respondent assumed the duty of striking with the hammer and while he was standing up close in obedience to his foreman's orders, a piece of chisel or rail chipped off and flew in his eye, thereby totally destroying the sight of the same and rendering it necessary to remove the eyeball.

THE EVIDENCE.

Foreman Sturgell commanded the men to:

> "Gang up and go in a hurry, that he wanted to get through there." (R., 22.)

Charles Hammerstein testified that foreman Sturgell commanded them to:

> "Step up close. Be ready to relieve the man that is hammering." (R., 74.)

Other witnesses testified to substantially the same thing on pages 40, 47, 54, 58, 61, 65, 66, 72 and 74 of the record.

Respondent stated that he was the next man to wield the sledge. (R., 78.)

George Mossbarger testified:

> "He said let's get this rail in right now. Kind of hurried around there. I think Bill, (meaning William Kuhn, the respondent) called him that morning about rushing things. I know he said something about it." (R., 72.)

Charles Hammerstein testified:

> "Likely there was some. Said some words. Anyway, I think Mr. Kuhn was a little like the rest of the boys, a little out of humor because we were kind of raw hided there that morning." (R., 76.)

Corbett Zimmerman testified:

> "We had orders to stand there, gang up around there and don't be afraid."

This peremptory order was made to all the workmen, including the respondent, because Corbett Zimmerman testified as follows:

> (Q) "Do you know whether the order included Mr. Kuhn, or not?"
> (A) "He said, 'all of you.' I reckon he did." (R., 41.)

Practically the entire force of men with whom the respondent was working at the time of the injury, some of whom are still employed by the railway company, have testified substantially to the same thing that Mr. Kuhn has stated in his testimony.

The railway company did not attempt to deny or refute any of the statements made by the respondent's witnesses concerning the work or the orders made when the injury occurred. Neither of the foremen mentioned in the case, namely, Mr. Sturgell or Mr. Bosworth, were called to rebut the testimony introduced by Mr. Kuhn and it therefore stands uncontradicted.

ARGUMENT.

Petitioner claims that the danger of cutting steel rails with defective tools and without the use of goggles was so open and obvious that respondent assumed the risk. We respectfully contend that the assumption of risk was avoided by respondent when he yielded his judgment to that of the foreman in charge, Mr. Sturgell, and acted in obedience to the peremptory order there made. In this order the workmen were commanded to:

> "Gang up and go in a hurry. That he wanted to get through there. Step up close. Be ready to relieve the man that is hammering. Let's get this rail in right now."

The foreman attempted to allay the fears of the respondent when he stated:

> "Gang up around and **don't be afraid.**"

Obviously respondent relied upon the judgment of the foreman and thus yielded his own judgment to that of the foreman, and by reason thereof sustained the injury complained of.

OHIO RULE OF PEREMPTORY ORDER.

The common law on the question herein involved was declared in Ohio by the case of the Van Dusen Gas & Gasoline Engine Co. v. Schelies, 61 O. S., 298, where Minshall, J., on page 309 of the opinion, says:

> "The clear result of the best considered cases is, that where an order is given a servant by his su-

perior to do something within his employment, apparently dangerous, and, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger, that no man of ordinary prudence would have obeyed it; and this is a question of **fact** for the jury to determine under proper instructions and not of law for the court." (Emphasis ours.)

Following this statement is a long list of cases, ending with Northern Pacific Railroad Co. v. Egeland, 163 U. S., 93, cited as the rule in the federal courts, and Judge Minshall adds, in pages 310 and 311:

"There is much reason in the rule that allows a favorable construction to be placed on the act of the servant in obedience to the order of his superior, though involving danger. Obedience to orders given by a master becomes a habit with the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so and without such obedience the business of the master could not be successfully conducted. It is then both reasonable and proper that the master should be held to a reasonable responsibility for what he orders his servants to do; and the conduct of a servant in obeying an order, under such circumstances, should not be too closely criticized by courts in administering the law. Whilst the law will not excuse the servant, where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence, would, under the circumstances, have obeyed the order, although involving danger. A servant has the right, and is expected to rely somewhat on the superior knowledge and skill of one in authority above him. So that, in this case, whether Schelies was, under the circumstances, guilty of contributory negligence, was a question of fact for the jury under proper instructions from the court.

> At the time the injury occurred he was in the employ of the defendant as a 'vise-hand', and had been called by the foreman to assist in the adjustment of a portable gasoline engine with pump and circular saw attached. The saw was in motion at the time and not properly protected; and he was ordered to adjust the shafting of the pump, which was close and next to the saw. He suggested that it was not safe to do so without stopping the saw. The foreman **peremptorily renewed the order;** he obeyed, his clothing was caught by the saw and he was seriously injured. It was in evidence, that he had been called a short time before to assist the foreman in the same way, and had done so without injury. The defendant asked the court to instruct the jury that: 'If the master or one standing in the place of the master, as the foreman in this case, orders a servant to expose himself to a danger known and appreciated by the servant, and in executing such order the servant is injured, he cannot recover unless he shows that he was injured solely in consequence of such danger, and without fault or negligence on his part.' " (Emphasis ours.)

This instruction was refused, and the court instead instructed the jury:

> "That if the plaintiff was expressly ordered by the foreman to do the work that he undertook to do, the fact that it was dangerous would not preclude the plaintiff from recovery unless the danger was so obvious, and injury thereby was so **inevitable,** that a man of ordinary prudence would not obey if he was ordered by his employer to do it." (Emphasis ours.)

The case then was given to the jury under proper instructions as have been shown and the instruction asked by the defendant was properly refused.

The Schelies case was followed and approved in Schnable v. C. C. C. & St. L. Ry. Co., 102 O. S., 97, a federal liability case opinion by Marshall, C. J.

In Vignola v. N. Y. Cent. Rd. Co., 102 O. S., 194, a federal liability case, page 202, the Schelies case is again approved and followed and on page 204 the Egeland case, 163 U. S., 93, is also cited with quotations from it as follows:

> "The plaintiff would naturally, therefore, be inclined to obey the orders of such superior, particularly if they were not of an obviously very dangerous character."

The case of Tuck v. Chapple, 115 O. S., 145 (O. L. B. & R., Aug. 16, 1926), affirms the Court of Appeals of Cuyahoga county, on authority of the Schelies case.

In National Coal Co. v. Beresezem, the Court of Appeals of Cuyahoga county held (McCullough, 140):

> "A servant who goes into a place of known danger at explicit and imperative order of a superior, rather than lose his job, does not thereby assume the risk and is not guilty of contributory negligence, provided he uses ordinary care in obeying the command."

The stare decisis of Ohio law is contained in the case of Maslek v. Penna R. Co., 26 O. App. Reports, 520, which was affirmed by the Supreme Court of this state and reported in Volume 118, O. S. Reports, page 644. The court in that case held that the question of assumption of risk was one of fact for the jury under proper instructions from the trial court where a peremptory order had been shown.

In the cited case of Tuck v. Chapple, 115 O. S., 117, the Ohio Supreme Court held that the following language constituted a peremptory order:

> "Tie this wagon to George's (Chapple's) wagon, George's wagon has got a chain on it. Your wagon hasn't got no chain on it. And, George, take it down to the coal yard."

FEDERAL RULE OF PEREMPTORY ORDER.

The federal rule of assumed risk is the common law rule subject to all of the exceptions and qualifications and though limited by the federal employers' liability act, the defense of assumed risk is nowhere defined or described in that act.

It is important to note and keep in mind the inflexible rule that questions on which reasonable minds might differ are questions of fact for the jury under proper instructions for their determination and such questions are never questions of law for the determination of the court.

In the case of the Northern Pacific Railroad v. Egeland, 163 U. S., 93, it is held:

> "The defendant in error, plaintiff below, was a common laborer in the employ of the plaintiff in error. When returning from his work on a train, the conductor ordered him and others to jump off at a station when the train was moving about five miles per hour. The platform was about a foot lower than the car step. His fellow laborers jumped and were landed safely. He jumped and was seriously injured. He sued to recover damages for those injuries. Held that the court below rightly left it to the jury to determine whether he was guilty of contributory negligence."

As above stated this case is the basis of the decision of the Van Duzen Gas, Etc., Co. v. Schelies, 61 O. S., 310, which introduced the "peremptory order" exception to the rule of assumed risk in Ohio.

The case of Lehigh Valley R. Co. v. Skoczyla, 278 Fed., 378, is conclusive upon the instant case for the reason that it was decided **after** the two leading cases involving the question, or similar questions here involved, the Seaboard v. Horton, 233 U. S., 492, and 239 U. S., 595, and after the case of N. Y., N. H. and H. R. Co. v. Vizvari, 210 Fed., 118.

Both of these cases involved the question of assumption of risk and the court comments at length upon the scope and doctrine of assumption of risk.

The Skoczyla case analyzes the doctrine of the Vizvari and the Seaboard v. Horton cases. In the Skoczyla case the railroad company prosecuted error from the decision of the lower court for its refusal to hold that the employee assumed the risk as a matter of law and for refusing to take this question from the jury.

The court held that the trial court acted properly in refusing to instruct the jury that the employee assumed the risk as a matter of law.

Petitioner cites the recent case of Hallstein v. Penna. R. Co. (C. C. A. 6th) 30 Fed. (2d), 594 (Ohio, 1929). We respectfully contend that this case supports the respondent's contention for the reason that the court specifically states on page 596 of the opinion:

> "There was no promise to correct the omission, **nor were representations of the lack of danger,** upon

which he might have been justified in relying, **made to allay his fears.''** (Emphasis ours.)

In the cited case there was no such order as in the case at bar. In the instant case the workmen were ordered as follows:

''Gang up around and **don't be afraid.''**

Here was a glaring attempt on the part of the foreman to allay respondent's fears. Ours is a stronger case than the case of Lehigh v. Skoczyla, supra, because the foreman in that case did not assure workmen that there was no danger and, **to not be afraid.** This case, in substance, holds that the question whether the injured workman assumed the risk or whether he was justified in relying upon the judgment of the foreman, **was a question for the jury.**

The jury in the case at bar was properly charged on this question and found in favor of the respondent.

We, therefore, respectfully submit that upon authority of both the Ohio rule and the federal rule the petition should be denied.

All of which is respectfully submitted.

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Attorneys for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. 34-35.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

WILLIAM KUHN,
Respondent.

IN ERROR TO THE COURT OF APPEALS OF PIKE COUNTY, OHIO.

BRIEF OF RESPONDENT.
(On the Merits.)

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35,719-35,720.

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

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THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
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vs.

WILLIAM KUHN,
Respondent.

IN ERROR TO THE COURT OF APPEALS OF PIKE COUNTY, OHIO.

BRIEF OF RESPONDENT.

(On the Merits.)

STATEMENT AND ARGUMENT.

Respondent, William Kuhn, at the time he received his injury which completely destroyed the sight of an eye, was waiting at the place where he was injured because of a peremptory order that he had received from his foreman, Sturgill, and the reason that he was at that particular place at that particular time was proximately and solely because of this peremptory order from his foreman.

He was one of a "gang" consisting of eight or ten workmen. Ben DeLay, one of the gang, was using a maul striking a chisel in the hands of another member of the gang in cutting a rail that they were preparing to place in the track. The testimony in reference to the peremptory order was not denied and was testified to by a number of the members of the gang.

Although the record shows without contradiction that it was customary to have goggles in doing that kind of work, the foreman was in such a hurry to have the work done that he had not gone to or sent anyone to bring the goggles from the tool house which was a relatively short distance away. There is some evidence in the record to show that there were quite a number of pairs of goggles in the tool house, but the evidence is conflicting as to whether there would be just two pairs of goggles or not used by the men at the same time.

Some of the evidence shows that the employe using the maul and the employe using the chisel were the only two using goggles and the reason for only using two was because those would be the only members of the gang who would be within the zone of danger, but the evidence shows without contradiction that Kuhn, the man injured, was standing very close to DeLay, the man using the maul, solely because of the peremptory order. Of course where Kuhn stood he was within the zone of danger, but because of the great hurry to make the repairs in the track, which by reason of the disrepair had caused derailments, the use of goggles was entirely disregarded, for the first time, by all of the men in doing that kind of work.

The foreman, Sturgill, ordered that the men constituting the gang "to gang close to the end of the rail and take turns striking" (R. p. 31), or in the words of another witness, "stand there, gang up around here and don't be afraid." (R. p. 45.) Smith, another member of the gang, testified, "He (Sturgill) was hurrying us all up to get the steel cut and put it (rail) in" (R. p. 46). Another witness, "* * * We had orders to crowd up there and had orders to take it" (R. p. 52). Another witness, "Yes, he (Sturgill) was a little rash with it (orders)" (R. p. 53). Another witness, "He (Sturgill) was telling us what to do as far as I can remember. He was putting us at one

thing and then another. He said to hurry up and get it in. They told him to hurry, I guess, because they wanted to use that side track and we were doing our best to get it in" (R. pp. 55-56). Another witness, "It was a hurry up job" (R. p. 58). Another witness, "I heard orders to hurry up. Something said about getting that switch in. Step up close. Be ready to relieve that man that's hammering" (R. p. 63). Another witness "we (gang) were kind of rawhided there that morning" (R. p. 65).

The record clearly shows that it was never intended that railroad workmen should be within the danger zone without being protected by the use of goggles.

This case was tried twice in the State Common Pleas Court and each time the jury returned a verdict in favor of the plaintiff. The State Courts of Appeal reversed the first case but affirmed the second case and the Supreme Court of Ohio refused to interfere with the judgment in favor of Kuhn. It is claimed that in reference to the use of the goggles that Kuhn assumed the risk. The law of Ohio clearly gives Kuhn a right of recovery and the leading case in Ohio on this subject is *Van Duzen Gas & Gasoline Engine Company v. Schelies.*

> "A servant was called by the foreman of a common master to assist him in the adjustment of a machine, and was ordered to do a certain thing in connection with the work; this, to the knowledge of the servant, was dangerous; but he had a short time before done substantially the same thing under the foreman's order without accident; * * * The court left it to the jury to say whether, under all the circumstances, the risk of injury was so great, that no ordinarily prudent man would have obeyed the order; * * *"
>
> *Van Duzen Gas & Gasoline Engine Co. v. Schelies,* 61 O. S. 298.

The two exceptions to the application of assumption of risk are promise to repair and the obedience of a per-

emptory order. This principle of law is well recognized by the Supreme Court of the United States.

The Supreme Court of the United States in *Northern Pacific Railroad Company v. Egeland* where the facts showed that Egeland was a member of a section gang and while the train was moving Potter, the conductor, gave orders to the men to jump of; that Egeland then jumped to the platform which was some distance below the level of the car in which he was riding and was injured. Egeland jumped because, as he said, "he was told to by the conductor, and because he thought he could do so safely, or the conductor would not have given the order. He relied on the conductor's direction at the time he jumped * * *." —*Northern Pacific Railroad Co. v. Egeland*, 163 U. S. 94.

In the instant case the plaintiff, Kuhn, was required to stand next to DeLay who was doing the striking of the chisel. None of the men had goggles. All the members of the gang had obeyed the forceful order of the foreman. Should he be denied the right to recover in obeying the foreman because it is claimed that no reasonable man would have obeyed the foreman under the circumstances when, as a matter of fact, all of the members of the gang then obeyed the foreman? It is true that the record shows that they did not do so cheerfully or willingly for the foreman said to them, "move up and do not be *afraid*."

The late Judge Taft stated in his opinion in the case of *Narramore v. Railroad Company* that assumption of risk arises by contract, express or implied, and in no other way. A peremptory order has the same effect on assumption of risk as a promise to repair. Quoting from opinion of Judge Taft:

> "It makes logical that most frequent exception to the application of doctrine by which the employe who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise

of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it."

Citing with approval:

Hough v. Railway, 100 U. S. 213;
Railroad v. Babcock, 154 U. S. 190.

"From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury, pending the making of the repair."

Narramore v. Railroad Co., 96 Fed. 301-302.

The position of Kuhn close to the mauler DeLay at the time he was injured, was compelled by his foreman, for Kuhn was next in order to take the maul which had been used in doing the same work by employes other than DeLay. Kuhn himself had used the maul at least once and of course had seen the other employes use the maul and chisel and no injury had come to any of them. The condition of the chisel had been described by a number of the members of the gang, all of whom had been in a position to observe its condition. Kuhn had not been in any position where he could make any kind of accurate observation. The chisel, although in the possession of the railroad company, was not introduced in evidence. That in and of itself has been held to be evidence in favor of plaintiff.

"Where the evidence was conflicting as to whether a rope, the parting of which caused the death of a seaman, was defective, the doubt should be resolved against the vessel because of her failure to produce the rope which was in her possession."

The Luckenbach, 144 Fed. 980.

The record conclusively shows that the only opportunity that Kuhn had of making observations of the chisel was for the short period of time that the members of the

gang had been working at the particular job on this particular day. The United States rule of assumption of risk is that the servant must know, or in the exercise of ordinary care should have known the defective condition *and* the dangers necessarily incident to the use of the defective instrumentality.

The brief of opposing counsel is all predicated, in reference to assumption of risk, on a situation where no peremptory order had been given and the State and Federal courts and all of the textbooks clearly recognize the difference between the application of assumption of risk where no peremptory order had been given and a situation where the servant was working under a peremptory order.

Believing that the question of assumption of risk in the instant case was a mixed question of law and fact to be decided by the jury, we respectfully submit this brief.

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SUPREME COURT OF THE UNITED STATES.

Nos. 34 and 35.—October Term, 1931.

34	The Chesapeake and Ohio Railway Company, Petitioner, *vs.* William Kuhn.	On Writ of Certiorari to the Supreme Court of the State of Ohio.
35	The Chesapeake and Ohio Railway Company, Petitioner, *vs.* William Kuhn.	On Writ of Certiorari to the Court of Appeals of Pike County, State of Ohio.

[November 23, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

While employed in interstate commerce as a section hand by petitioner, an interstate carrier, (Acts April 22, 1908, 35 Stat. 65; April 5, 1910, Chap. 143, 36 Stat. 291; U. S. Code Title 45, Chap. 2) William Kuhn suffered serious injury. Thereafter he sued the Company for damages in the Court of Common Pleas, Pike County, Ohio. He alleged that the accident resulted from its negligence in the following matters—Ordering him to use a defective sledge hammer and chisel; failing to promulgate and enforce proper rules concerning the upkeep of tools ordinarily used, to furnish guards or goggles for workmen's eyes, to provide a reasonably safe place for him to work.

The Company denied negligence. It also set up in defense that the plaintiff voluntarily assumed the risk incident to his employment. At the trial it duly, but unsuccessfully, requested a directed verdict because of such assumption.

The jury returned a verdict for the respondent. Judgment upon this was affirmed by the Court of Appeals; the Supreme Court denied a review. This Court allowed writs of certiorari both to the Supreme Court—No. 34, and the Court of Appeals—No. 35. The cause is properly here on the latter writ. Number 34 will be dismissed.

On the day of the accident, February 9, 1926, William Kuhn, an experienced section hand 54 years old, was engaged with others in repairing a side track leading from petitioner's main line to a steam shovel. It became necessary to remove two steel rails and shorten them some six or eight inches. They were first laid on the ground and then cut with a cold chisel. One man held the chisel while respondent and two others, acting in turn, struck it with a heavy hammer. None of them wore goggles; none asked for goggles or objected to the method of operation. The first rail had been severed; work had begun on the second. While respondent was standing by awaiting his turn to strike, a steel chip from the chisel or rail struck and destroyed his eye. On other occasions he had assisted in cutting steel rails when goggles were used and he knew chips would fly during such an operation. "That was the value of goggles," he testified. He understood the dangers incident to the undertaking. The job was a hurry-up one. The assistant foreman in charge had told the men "to gang up and go in a hurry, that he wanted to get through there." "Don't be afraid."

We think the evidence clearly discloses that Kuhn's injury resulted from the ordinary hazards of his employment, which he fully understood, and voluntarily assumed. There was no complaint, no promise by his superior to mitigate the obvious dangers. The trial judge should have directed a verdict for the Railway Company.

In cases like this, where damages are claimed under the Federal Employers' Liability Act, defense of the assumption of the risk is permissible and where the undisputed evidence clearly shows such assumption the trial judge should direct a verdict for the defendant. Moreover, in proceedings under that Act, wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the Federal courts. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 508; *Chesapeake & Ohio R. R.* v. *De Atley*, 241 U. S. 310; *Boldt* v. *Pennsylvania, R. R.*, 245 U. S. 441, 445; *New Orleans & N. E. R. R.* v. *Harris*, 247 U. S. 367, 371; *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U. S. 472, 474.

The court of appeals acted upon the erroneous theory that it should follow the views of the Supreme Court of the State rather than those of this Court in respect of questions arising under the

Liability Act. That statute, as interpreted by this Court, is the supreme law to be applied by all courts, Federal and State. Second Employers' Liability Cases, 223 U. S. 1, 57, 58. Where this view is not accepted, as in the present cause, it is within the power of this Court to determine and apply the proper remedy.

The judgment below is reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.